MARYLAND Family Law Monthly
THE DAILY RECORD

SUPPLEMENT
February 2012

INDEX

COURT OF APPEALS

Reported opinion

COURT OF SPECIAL APPEALS

Unreported opinions

(Continued on page 2)

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INDEX (CONTINUED)

COURT OF SPECIAL APPEALS

Unreported opinions

Cite as 2 MFLM Supp. 3 (2012)

Estates and trusts: order for an accounting: appealability

Catherine A. Moreland Johnson v. James Michael Johnson

No. 63, September Term, 2009

*Argued Before: Bell, C. J., Battaglia, Greene, *Murphy, Adkins, Barbera, Eldridge, John C. (Retired, Specially Assigned), JJ.*

Opinion by Eldridge, J.

Filed: December 14, 2011. Reported.

**Murphy, J,, now retired, participated in the hearing and conference of this case while an active member of this Court but did not participate in the decision and adoption of this opinion.*

Ed. note: Reported opinions of the state courts of appeal are subject to minor editing by the courts prior to publication. Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

An order for an accounting by the trustee of an estate is not appealable because it is not a final judgment and does not decide an issue concerning the parties' rights.

The controversy in this case is between the trustee of an inter vivos trust, petitioner Catherine A. Moreland Johnson, and her stepson, respondent James Michael Johnson, who is a "beneficiary" of the trust.[1] The trust was described by the Court of Special Appeals as follows (*Johnson v. Johnson*, 184 Md. App. 643, 647-648, 967 A.2d 274, 276-277 (2009), footnotes omitted):

> "The Johnson Family Trust was created on August 25, 2004, by Edward R. Johnson and Catherine A. Moreland Johnson, his wife. They were named as 'Trustors' and 'Co-Trustees' and they established the Trust, according to its express language, with the intent that, while they were both living, they would each equitably own an undivided one-half interest in all property subject to the Trust. This was to be accomplished by the use of the federal gift tax exemption for transfers between husband and wife. Trust property, which was listed in an attached 'Schedule A,' constituted the 'Trust Estate' and, due to its gifting provisions, the beneficial interest of the first Trustor to die was to be exactly equal to that of the surviving Trustor. Trust, Article I.
>
> "On February 14, 2006, Edward was the first to die. Pursuant to the Trust instrument, the Trust Estate was then to be divided into two shares. Trust A was to be created to take advantage of the federal estate tax exclusion and other tax provisions. The remaining portion of the decedent's interest was to be distributed to an irrevocable Trust B. Trust, Article IV.
>
> "The surviving Trustor (Catherine) is entitled to the income and potentially all of the principal of Trust A during her lifetime, if needed for her health, maintenance, reasonable comfort and support. She has a power of appointment to dispose of the undistributed income and principal of Trust A by her Last Will and Testament. If the power is not exercised, upon her death, the Trust A corpus is to be added to Trust B and distributed according to its terms.
>
> "Catherine has the same lifetime entitlement to the income and to principal of Trust B if needed for her health, maintenance, or support. She has a limited power of appointment over the Trust B estate which authorizes her to leave it to one or more of any children and/or other descendants of both Trustors in such shares as she may deem appropriate. Trust, Article IV. If Catherine does not exercise this limited power, distribution of the Trust B corpus is governed by the Trust's Article VI, which expressly names Edward's son, James, as a beneficiary, if he survives Catherine."

After Edward's death, James twice asked

Catherine for an accounting of the trust, but Catherine did not answer his requests. James then instituted the present action by filing in the Circuit Court for Calvert County a "Petition For Court Assumption of Jurisdiction of [The] Trust Estate And Related Relief." James requested, *inter alia*, that the court assume jurisdiction over the trust and require that Catherine file an accounting.

After Catherine's response, a hearing, and an opinion by the court, the Circuit Court issued the following order:

> "**ORDERED**, that the Petition for Court Assumption of Jurisdiction of a Trust Estate and Related Relief is hereby
>
> GRANTED, and it is further
>
> "**ORDERED**, that Respondent Catherine A. Moreland Johnson provide an accounting of the Johnson Family Trust to Petitioner James Michael Johnson . . . ."

Catherine noted an appeal from the above-quoted order, and thereafter she filed in this Court a petition for a writ of certiorari prior to oral argument in the Court of Special Appeals. This Court denied the petition, noting that the case was "[p]ending in the Court of Special Appeals." *Johnson v. Johnson*, 404 Md. 660, 948 A.2d 72 (2008).

The Court of Special Appeals, in a reported opinion, affirmed the Circuit Court's order, *Johnson v. Johnson*, *supra*, 184 Md. App. 643, 967 A.2d 274. Catherine again filed in this Court a petition for a writ of certiorari, and this time the petition was granted. *Moreland Johnson v. Johnson*, 409 Md. 47, 972 A.2d 861 (2009).

The petitioner Catherine has raised issues concerning the status of James, whether he has a right to an accounting, and whether the Circuit Court's order contravenes the terms of the trust. Neither the parties nor the courts below have raised any issue concerning the appealability of the Circuit Court's order. Nevertheless, an order of a circuit court must be appealable in order to confer jurisdiction upon an appellate court, and this jurisdictional issue, if noticed by an appellate court, will be addressed *sua sponte*. *See, e.g., Stachowski v. State*, 416 Md. 276, 285, 6 A.3d 907, 912 (2010) ("Although none of the parties raised a jurisdictional issue in these cases, this Court is obligated to address *sua sponte* the issue of whether we can exercise jurisdiction"); *Miller & Smith v, Casey PMN*, 412 Md. 230, 240, 987 A.2d 1,7 (2010) ("[P]arties cannot confer jurisdiction on our Court, and we must dismiss a case *sua sponte* on a finding that we do not have jurisdiction"); *In re Nicole B.*, 410 Md. 33, 62, 976 A.2d 1039, 1055-1056 (2009) ("[A] party in the trial court must file a timely notice of appeal, from an appealable judgment, in order to confer upon an appellate court subject matter jurisdiction over that party's appeal. * * * 'Where appellate jurisdiction is lacking, the appellate court will dismiss the appeal *sua sponte*," quoting *Eastgate Associates v. Apper*, 276 Md. 698, 701, 350 A.2d 661, 663 (1976)); *Biro v. Schombert*, 285 Md. 290, 293, 402 A.2d 71, 73 (1979) ("[N]either side has questioned the jurisdiction of the Court of Special Appeals to review the judgment in this case. However, . . . we believe that the Court of Special Appeals lacked jurisdiction to entertain the appeal. Therefore . . . , without considering the merits of the question presented by petitioner, we shall vacate the judgment of the Court of Special Appeals and remand the case to that court with directions to dismiss the appeal").

When petitioner's counsel was asked at oral argument whether the Circuit Court's order was appealable, he responded by stating that the order was appealable as a final judgment. *See* Maryland Code (1974, 2006 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article.[2] *See also WSSC v. Bowen*, 410 Md. 287, 295, 978 A.2d 678 (2009):

> "The 'exceptions' to the final judgment principle were recently summarized in *St. Joseph's v. Cardiac Surgery, supra*, 392 Md. at 84, 896 A.2d at 309:
>
> 'Moreover, under Maryland law, the "few, limited exceptions" to the final judgment nile number only three. Judge Wilner for the Court in *Salvagno v. Frew*, 388 Md. 605, 615, 881 A.2d 660, 666 (2005), explained:
>
> "[W]e have made clear that the right to seek appellate review of a trial court's ruling ordinarily must await the entry of a final judgment that disposes of all claims against all parties, and that there are only three exceptions to that final judgment requirement: appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals from interlocutory rulings allowed under the common law collateral order doctrine."

It has been settled in Maryland for almost 200 years that an order for an accounting or similar referral is not appealable as a final judgment because, "by [the

order], nothing is finally settled between the parties, and . . . the order for an account . . . was only preparatory to a final decree," *Snowden et al. v. Dorsey et al.*, 6 H. & J. 114, 116 (1823) (dismissing an appeal from an order of Chancellor Kilty that the parties provide an accounting). *See, e.g., Anthony Plumbing v. Atty. Gen.*, 298 Md. 11, 16-17, 467 A.2d 504, 506-507 (1983); *Hohensee v. Minear*, 253 Md. 5, 6-7, 251 A.2d 588, 588-589 (1969); *Johnson v. Hoover*, 75 Md. 486, 490, 23 A. 903, 904 (1892); *Wilhelm v. Caylor*, 32 Md. 151, 161-162 (1870); *Clagett v. Crawford*, 12 G. & J. 275, 285 (1841). In addition, the Circuit Court's order was neither appealable under Rule 2-602 nor appealable under the collateral order doctrine. *See WSSC & Bowen, supra*, 410 Md. at 294-300, 978 A.2d at 683-687, and cases there cited.

The only statute authorizing interlocutory appeals from orders directing an accounting is § l2-303(3)(vi) of the Courts and Judicial Proceedings Article. If the Circuit Court's order is appealable, it would have to be appealable under that statute. Section 12-303(3)(vi) authorizes an appeal from an interlocutory order entered by a circuit court "[d]etermining a question of right between the parties and directing an account to be stated on the principle of such determination." The Circuit Court's order in the present case is clearly not within § 12-303(3)(vi) because, in the plain language of the statute, the order did not "[d]etermin[e] a question of right between the parties. . . ."

The provision which is presently codified as § 12-303(3)(vi) was first enacted as Ch. 367 of the Acts of 1845, passed by the General Assembly on March 10, 1846. Ch. 367 provided in pertinent part as follows:

> "SECTION 1. *Be it enacted by the General Assembly of Maryland*, That an appeal may be taken and prosecuted from any decree or order of the court of chancery, or any county court as a court of equity, determining a question of right between the parties, and directing an account to be stated, on the principle of each determination. . . ."

Except for the difference in the names of trial courts, the language of the provision has remained virtually unchanged since 1846.

The requirement that, to be appealable, the order for an accounting must decide a question of right between the parties was applied by this Court even before Ch. 367 was enacted. *In Clagett v. Crawford, supra*, 12 G. & J. at 285, decided in December 1841, this Court dismissed an appeal from an order directing an account because "[t]he order does not adjudicate any right between the parties." Subsequent cases under Ch. 367 and successor statutes have reaffirmed that an interlocutory order directing an accounting is not appealable unless the order also decides "a question of right" between the parties. *See, e.g., Goodburn v. Stevens*, 1 Md. Ch. 420, 427 (1849) (In reversing an order of the Court of Chancery, this Court stated that "[t]he right of appeal from these interlocutory orders [directing an account] has been conferred only where a question of right has been determined between the parties"); *Owings v. Worthington*, 4 Md. 260, 261 (1853) (Appeal from an order directing an account was dismissed); *Wilhelm v. Caylor, supra*, 32 Md. at 161-162; *Nally v. Long*, 56 Md. 567, 570-571 (1881) (Because the order for an account, *inter alia*, did settle the rights of the parties, it was appealable).

To reiterate, as the trial court's order in this case did not decide any issue concerning the parties' rights, the order was not appealable.

JUDGMENT OF THE COURT OF SPECIAL APPEALS VACATED AND CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO DISMISS THE APPEAL. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE DIVIDED EVENLY BETWEEN THE PARTIES.

FOOTNOTES

1. The exact status of James, and whether he has standing, appear to be among the disputed issues in this case. The petitioner refers to James as "a potential contingent beneficiary" (petitioner's brief at 5), and the respondent James refers to himself as "a remainder beneficiary." We shall, for convenience, refer to James simply as a "beneficiary." Our use of this term is not intended to represent any expression of our views on any disputed issue.

2. Section 12-301 of the Courts and Judicial Proceedings Article states:

> " 12-301. Right of **appeal from final judgments — Generally.**
>
> Except as provided in § 12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment."

NO TEXT

Cite as 2 MFLM Supp. 7 (2012)

Protective orders: abuse of a vulnerable adult: sufficiency of the evidence

Edar Rogler, et al.

v.

Diane Rogler-Goodman

No. 15, September Term, 2010

Argued Before: Wright, Watts, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Salmon, J.

Filed: December 8, 2011. Unreported.

Appellant's request for a temporary protective order against her sister was properly denied; while her sister's behavior toward appellant and their mother may have been disrespectful, it did not constitute stalking and did not rise to the level of placing the parties in fear of imminent serious bodily harm.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

On March 3, 2010, Edar Rogler, appellant, filed in the Circuit Court for Anne Arundel County a petition on behalf of herself and her mother, Margarette B. Rogler, M.D., seeking protection from domestic violence and vulnerable adult abuse by her sister, Diane Rogler-Goodman, appellee. After an *ex parte* hearing on March 3, 2010, the court denied the request for a protective order. Appellant filed a notice of appeal. Thereafter, she filed a motion for new trial or to alter or amend the judgment, which was denied.

Appellant, who is proceeding in this appeal in proper person, challenges the propriety of the circuit court's denial of her petition for a protective order:[1]

For the reasons set forth below, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 3, 2010, appellant filed, on behalf of herself and her mother, Margarette B. Rogler, M.D. ("Dr. Rogler"), a petition seeking temporary protection from domestic violence and vulnerable adult abuse by appellee. Appellant alleged that Dr. Rogler had resided with appellee since before September 1, 2009. She also alleged that on February 16, 2010, a court ordered visitation between appellant and Dr. Rogler occurred. According to appellant's written allegations, appellee agreed "on the record" that she would not be involved with transferring Dr. Rogler off of appellee's property in Davidsonville. Nevertheless, appellant alleged, on "various occasions" appellee has interfered with the visitation, and, on February 28, 2010, appellee acted in an "angry manner," which caused appellant and other passengers who were in the car she was occupying to be afraid.

An *ex parte* hearing was held on March 3, 2010, to establish whether a protective order should be issued. At the hearing, it was established that, pursuant to a prior court order, Dr. Rogler was to reside with appellee, and that Dr. Rogler's attorney, Gary Elson, Esquire, would serve as Dr. Rogler's temporary guardian. Also pursuant to a prior court ruling, appellant was to receive three unsupervised visits per week with Dr. Rogler, and she was he accompanied by an "adult who would go in the car with [her] up the driveway" of her sister's home in Davidsonville to pick up Dr. Rogler for those visits. The accompanying adult was to "get out of the car, go to the door of the house, get [Dr. Rogler], escort [her] to the car and . . . go back down the driveway."

According to appellant's testimony, on February 28, 2010, when she went to appellee's house to pick up Dr. Rogler, appellee "came right up to the car glaring at [her] and deviated (sic) and went within six inches of the monitor and was growling at her and then went and confronted the other accompanying adult and everybody is afraid." Appellant explained that she did not "want to be stalked, when [she is] on a court ordered visit with [her] mom[.] I don't want [appellee] following us, interacting with anybody."

In order to understand how the transfer of Dr. Rogler was supposed to occur for visitation with appellant, the presiding judge, the Honorable Nancy Davis-Loomis, reviewed the guardianship file Case No.: T-09-092510, including a March 1, 2010 *pendente lite* order. Judge Davis-Loomis read the following portion of the last mentioned order aloud:

> At all times while Edar Roglar and the adult in her company are on the property of Diane Rogler-Goodman for purposes of picking up Margaret Rogler for visitation or returning her from visitation, she shall under all cir-

> cumstances remain in her vehicle and is not permitted to leave the vehicle.

The *pendente lite* order also provided that neither appellant nor any of the adults accompanying her, should enter or attempt to enter the appellee's house or garage.

Susan Goodknight was one of the individuals present when appellant picked up Dr. Rogler for a visit on February 28, 2010. According to Ms. Goodknight, appellant was driving, she (Ms. Goodknight) was in the front passenger seat, and a man who did not want his name used in the court record because "he [was] afraid," was in the back seat. The trio arrived at appellee's house early, so they waited down the street until about 10 minutes before the time set for the visitation. Appellant then drove up to the house and honked the car's horn, and appellee came out of the house, dressed in "riding garb." Appellee stared into the car, walked within inches of the passenger side window where Goodknight was sitting, and stared at her and the man in the back seat. Eventually, appellee went into her house and, thereafter, Dr. Rogler appeared. Goodknight testified:

> The man got out of the car and got Dr. Rogler and [appellee] was involved in the transfer and she asked the man to go to the garage door and she would bring Dr. Rogler through and he got her and then he brought Dr. Rogler into the car.

Appellee did not speak, but she had an "odd expression on her face" that Ms. Goodknight described as follows:

> she looked cross, her eyes, but she was smirking and staring and there was something about the way she was walking, it was unnatural and she did come extremely close to the car but I was afraid to look at how close she came because I was just looking forward. I didn't want her to see me looking back at her or in any way looking at her.

Judge Davis-Loomis concluded that the behavior of appellee as described by appellant and Ms. Goodknight did not constitute stalking and did not rise to the level of placing the parties in fear of imminent serious bodily harm. Although the judge acknowledged that the expression on appellee's face might have been "disrespectful," she concluded that appellee's expression did not "indicate that harm [was] about to occur." The judge denied the petition for a protective order.

DISCUSSION

In 1980, the Maryland General Assembly enacted the domestic violence statutes, currently codified in §§ 4-501 through 4-516 of the Family Law Article ("F.L.").[2] The statute grants courts the power to issue civil protective orders, which can prohibit a perpetrator of domestic violence from, among other things, abusing, contacting or harassing the victim. Persons eligible for relief under the domestic violence statutes include current or former spouses, cohabitants, relatives by blood, marriage or adoption, parents, stepparents, children or stepchildren, individuals who reside or resided with an alleged abuser for at least 90 days out of the last year before filing a petition, vulnerable adults, and individuals who have a child in common with an alleged abuser. Md. Code (2006 Repl. Vol., 2009 Cum. Supp.) §4-50(1) of the Family Law Article ("F.L."). A person eligible for relief may file, in either a circuit court or the District Court, a petition alleging abuse and requesting immediate and temporary relief from the violence. F.L. §§4-501(f) and 4-504(a). Once the petition is filed, the petitioner appears before a judge for a hearing, after which the judge may enter a temporary order to protect a petitioner from abuse and grant emergency relief if the judge finds that there are "reasonable grounds" to believe that abuse has occurred. F.L. §4-505(a)(1).

F.L. sections 5-701(a) and (b) define "abuse" as follows:

> (a) *In general.* — In this subtitle the following words have the meanings indicated.
>
> (b) *Abuse.* —
>
> (1) "Abuse" means any of the following acts:
>
> (i) an act that causes serious bodily harm;
>
> (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm;
>
> (iii) assault in any degree;
>
> (iv) rape or sexual offense under §§3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree;
>
> (v) false imprisonment; or
>
> (vi) stalking under §3-802 of the Criminal Law Article.
>
> * * *
>
> (3) If the person for whom relief is sought is a vulnerable adult, "abuse" may also include abuse of a vulnerable adult, as defined in Title 14, Subtitle 1 of this article.

F.L. §4-501(a) and (b)(1) and (3).

Md. Code (2002, 2009 Supp.) §3-802 of the Criminal Law Article ("C.L.") defines "stalking" as:

> (a) "*Stalking" defined.* — In this section, "stalking" means a malicious course of conduct that includes approaching or pursuing another where the person intends to place or knows or reasonably should have known the conduct would place another in reasonable fear:
>
> (1) (i) of serious bodily injury;
>
> (ii) of an assault in any degree;
>
> (iii) of rape or sexual offense as defined by §§3-303 through 3-308 of this title or attempted rape or sexual offense in any degree;
>
> (iv) of false imprisonment; or
>
> (v) of death; or
>
> (2) that a third person likely will suffer any of the acts listed in item (1) of this subsection.

A "vulnerable adult" is "an adult who lacks the physical or mental capacity to provide for the adult's daily needs." FL. §14-101(q). With respect to vulnerable adults, the term abuse "means the sustaining of any physical injury by a vulnerable adult as a result of cruel or inhumane treatment or as a result of a malicious act by any person." F.L. §14-101(b).

This case was decided without a jury. Maryland Rule 8-131(c), is controlling and provides, in relevant part, that "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses."

With these standards in mind, we turn to the facts of the case before us. Appellant contends that there were reasonable grounds upon which the circuit court could have held that appellee falsely imprisoned appellant and the other adults in the vehicle, and that she was stalking them. She argues that:

> [Appellee's] continually approaching [appellant] and threatening Dr. Rogler, breaking and entering into [appellant's] home and removing her license plates demonstrates a pattern of abusing her protective order and is placing [appellant] and third parties in fear of serious bodily harm or death and should met [sic] the legal test for stalking because [appellee] intends her malicious conduct and intends to place her victims in fear of serious bodily harm or death.

Appellant also argues that the following actions supported a finding that there were reasonable grounds to issue an *ex parte* temporary protective order:

> A. Attempted to defraud Margarette B. Rogler, M.D. on or about July 31, 2009;
>
> B. Physically assaulted Margarette B. Rogler, M.D. and appellant with a horsewhip and paring knife on or about August 1, 2009, Criminal Case No. 2A0020963l and 4A00210648;
>
> C. Following appellant on August 4, 2009 to harass her, Case No. 02-C-09-143993;
>
> D. Making a false police report on or about August 16, 2009, Case No. 02-C-09-143993;
>
> E. By violating appellant's temporary protective order issued in Case No. 02-C-09-143993 by serving appellant with a hate letter on August 26, 2009, Criminal Case. No. 1A0021588 1;
>
> F. Stalking Margarette B. Rogler, M.D. and appellant to Abilene, Texas and kidnapping Margarette B. Rogler, M.D. on or about August 26, 2009 against the orders of the Abilene police;
>
> G. By taking Margarette B. Rogler, M.D. to Las Vegas, Nevada to be examined by two psychiatrists without a court order;
>
> H. By transporting Margarette B. Rogler interstate without a court order in violation of state and federal laws;
>
> I. By breaking and entering into appellant's apartment on or about September 8, 2009, Criminal Case No. 1A00215881;
>
> J. Removing the license plates from appellant's vehicle on or about December 26, 2009, Criminal Case No. 1A00215881;
>
> K. By threatening Margarette B. Rogler, M.D. with physical violence if she talked with appellant on or about January 14, 2010; and,
>
> L. By approaching and harassing appellant and accompanying adults,

placing them in fear of serious bodily harm or death on the court-ordered visitation on February 28, 2010, and other continuing actions.

In addition, appellant argues that Judge Davis-Loomis should have applied an "individualized objective" standard so as to view the circumstances as they would be perceived by a reasonable person in appellant's position. According to appellant, if the court had applied that standard, it would have found that a reasonable person in the position of appellant and the other adults present at the visitation would have been in fear of serious bodily injury or death as a result of appellee's "ongoing malicious conduct."

Appellant further argues that she and Dr. Rogler were denied due process and equal protection under the Federal and Maryland Constitutions and the Maryland Declaration of Rights. She maintains that it was unnecessary for the judge to request and review the guardianship file during a recess, and that even if the guardianship file was relevant, the judge should not have considered material filed after the February 28, 2010 incident, but should have considered the evidence contained in the file showing appellee's prior malicious conduct. Finally, appellant argues that the circuit court lacked the power to delegate its judicial responsibilities under the domestic violence statutes to attorney Gary M. Elson, and she asserts that Mr. Elson had a financial stake in the outcome of the guardianship case and violated Maryland's Rules of Professional Conduct.

We find no merit in any of appellant's contentions. The evidence that was presented below was insufficient to establish that abuse occurred. The evidence showed only that appellee came within inches of the car, stomped, glared, and stared at appellant and the others who were present, growled at Ms. Goodknight, and "confronted" the unidentified man. As mentioned earlier, Ms. Goodknight testified that appellee "kept staring into the car" at her, and the male passenger and that appellant had a smirk on her face and was walking in an "unnatural" way. Notwithstanding the fear allegedly experienced by the unidentified man, Ms. Goodknight testified that he got out of the car, had some sort of conversation with appellee, and then went to the garage and helped to bring Dr. Rogler to the car.

Appellant testified that appellee owns guns, but did not claim that she saw appellee use or brandish any gun in her presence. Appellant further alleged that there were five criminal charges filed against appellee. In those criminal cases, appellant was evidently the complaining witness and alleged that appellee violated a temporary protective order, assaulted and battered her with a horse whip and a paring knife. No evidence, however, was introduced in support of these claims at the hearing before Judge Davis-Loomis.

Further, there was no evidence that either appellant or anyone in her party suffered bodily harm of any kind, and, although appellant testified that she was afraid, there was no evidence to support the conclusion that either she or Dr. Rogler was placed in reasonable fear of serious bodily harm, or that they were falsely imprisoned, or stalked, as that term is defined in §3-802 of the Criminal Law Article.

Appellant also argues in her brief that appellee attempted to defraud Dr. Rogler; that she assaulted either appellant or Dr. Rogler with a horse whip or paring knife or with any other weapon; that she followed appellant on August 4, 2009; that she made a false police report; that she violated a temporary protective order by "serving" appellant with a hate letter; that "she stalked Dr. Rogler [and appellant] to Texas" or that she kidnapped Dr. Rogler; that she took Dr. Rogler to Las Vegas, Nevada for any purpose; that she violated any state or federal law with respect to the interstate transport of Dr. Rogler; that she broke into and entered appellant's apartment; that she removed the license plates from appellant's vehicle; or, that she threatened appellant with physical violence on or about January 14, 2010. While those allegations may have been raised in the guardianship proceeding or other court actions, the record makes clear that Judge Davis-Loomis simply reviewed the guardianship file in order to determine how the visitations between appellant and Dr. Roglar were supposed to be carried out. Mere allegations made by appellant in other court proceedings were sufficient to support either a finding of abuse or the issuance of a protective order in this case.

Similarly, we reject appellant's contention that the court failed to view the circumstances as they would be perceived by a reasonable person in appellant's position. The evidence that appellee stomped the ground, stared and glared at appellant and the other people with her, or that she walked in an unnatural manner, is not sufficient to support the conclusion that appellant and Dr. Rogler, or any reasonable person in their position, reasonably feared serious bodily injury or death.

Appellant's references in her brief to appellee's "ongoing malicious conduct" were not supported by evidence, but merely by references to allegations made in other court proceedings.

Appellant contends that the judge should have considered the evidence contained in court files that showed appellee's prior malicious conduct. She cites no authority to support that argument and we know of none. In any event, except for the bald allegations in pleadings, nothing in the material provided to Judge Davis-Loomis supported appellant's contentions that

appellee had engaged in malicious conduct on prior occasions. Moreover, the record is absolutely devoid of evidence to support the contention that either appellant or Dr. Rogler were denied their constitutional due process rights or equal protection under the law.

Finally, appellant contends that the court lacked the power to delegate its judicial responsibilities under the domestic violence statutes by requiring disputes regarding the visitation order to be referred, initially, to attorney Gary M. Elson. She also alleges that Mr. Elson had a financial stake in the outcome of the guardianship case and has violated the Maryland Lawyers' Rules of Professional Conduct. These issues were not raised in the underlying petition for a protective order and are not properly before us on appeal. *See*, Md. Rule 8-131(a) (Ordinarily, except for jurisdictional issues, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, ...")

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Appellee did not file a brief in this Court.

2. The domestic violence act was enacted by Chapter 887 of the Acts of 1980, and was originally codified as Md. Code (1974, 1980 Repl. Vol., 1980 Supp.), Courts & Judicial Proceedings Art., §§4-501 through 4-506. In 1984, the statute was repealed and later reenacted in the Family Law Article, §§4-501 through 4-516.

NO TEXT

Cite as 2 MFLM Supp. 13 (2012)

Civil procedure: motion to dismiss: de novo review

Tibebe Samuel

v.

Bezuayehu Yenefanta

No. 1581 September Term, 2010

Argued Before: Zarnoch, Graeff, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Zarnoch, J.

Filed: December 8, 2011. Unreported.

The circuit court's dismissal of appellant's complaint against his ex-wife was legally correct in that most of his claims were barred by the statute of limitations and the rest failed to allege facts which, if proven, would entitle him to relief.

Appellant, Tibebe Samuel, filed suit against his former wife, appellee Bezuayehu Yenefanta in the Circuit Court for Prince George's County, alleging seven counts. Samuel brings this appeal following a dismissal of his suit, and later a denial of his motion for reconsideration.

FACTS AND LEGAL PROCEEDINGS

Samuel and Yenefanta were married on January 29, 1998 and are the parents of two minor children. The parties were granted an absolute divorce on June 27, 2007. The events giving rise to this appeal are a result of the circumstances surrounding the parties' acrimonious divorce proceedings.

In a *pro se* complaint filed June 18, 2009, Samuel sought damages in the amount of $5,500,000.00 from Yenefanta for breach of contract, interference in parent child relationship, defamation of character, fraud and misrepresentation, theft, malicious prosecution and abuse of process, as well as "intentional infliction of emotional distress, unethical and illegal conduct that caused emotional harm and economic loss." On September 2, 2009, following service after repeated failed attempts, Yenefanta filed an answer which also included a motion to dismiss. Because her answer was unsigned, the court refused to accept it, and instructed Yenefanta to refile a signed answer, which she did on October 3, 2009. Based on Yenefanta's initial unacceptable answer, Samuel filed for a default judgment on November 10, 2009, the same day the court issued a scheduling order. On December 4, 2009, the court denied his motion for default judgment without a hearing. On December 17, 2009, Samuel filed a motion to reconsider the denial of default judgment and on March 15, 2010, his motion was denied without a hearing. In an order dated May 6, 2010, entered May 11, 2010, Samuel's case was dismissed with prejudice following a hearing. At the hearing, the trial judge stated:

> Mr. Samuel, I've read the complaint. You were late for the pretrial conference. You didn't file a pretrial statement. Frankly, most, if not all of these claims, are barred by the Statute of Limitations or other issues. I think it would be a waste of the Court's time and resources to allow this to proceed any further. So, for the reasons that I've just stated, I am going to dismiss this claim.

Samuel filed a Motion to Reconsider which, after a hearing, the circuit court denied on August 27, 2010. Samuel timely filed a notice of appeal on September 8, 2010.

On March 30, 2011 this Court dismissed Samuel's appeal based upon his failure to file briefs and record extracts by the March 22, 2011 deadline. Samuel filed a Motion to Reconsider, claiming he was unable to timely file the required documents due to illness. On May 19, 2011, this Court granted his motion to reconsider. We now consider the merits of Samuel's appeal.

QUESTIONS PRESENTED

The appellant presented the following questions for review, which we have re-phrased:[1]

> 1. Did the trial court abuse its discretion in denying appellant's request for default judgment?
>
> 2. Did the trial court commit legal error by dismissing appellant's suit?

For the following reasons, we answer these questions in the negative and affirm the decision of the circuit court.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

DISCUSSION

I. Denial of Default Judgment

We will not set aside the circuit court's denial of a default judgment unless it amounts to an abuse of discretion. *Zdravkovich v. Siegert*, 151 Md. App. 295, 310 (2003). We also note that the circuit court has discretion to allow, absent a showing of prejudice or abuse of discretion, late filing. *Easter v. Dundalk Holding Co.*, 233 Md. 174, 179 (1963). Samuel contends the circuit court erred in denying his motion for a default judgment. While Yenefanta initially failed to file a proper answer because it lacked her signature, she cured this defect, with leave of court, by filing an identical answer containing her signature. Samuel was clearly on notice of the arguments contained in Yenefanta's answer, and has failed to make any argument that he was prejudiced by the court's ruling. We therefore hold that the court did not abuse its discretion by refusing to grant Samuel's request for a default judgment against Yenefanta.

II. Dismissal with Prejudice

A. Standard of Review

When the circuit court grants a motion to dismiss, we must determine, "whether the trial court was legally correct in its decision to dismiss." *Doe v. Roe*, 419 Md. 687, 693 (2011) (internal citations omitted). Therefore, our review is *de novo.* "In reviewing the complaint, we must presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom. . . . Dismissal is proper only if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven." *Britton v. Meier*, 148 Md. App. 419, 425 (2002) (internal citations omitted).

B. Appellant's Complaint

Samuel contends the circuit court erred in granting Yenefanta's motion to dismiss. Because we conduct a *de novo* review of the circuit court's dismissal, we will discuss each count contained in Samuel's complaint.

Regardless of the factual adequacy of Samuel's pleadings, it is clear than many of the counts that he alleges are barred by the statute of limitations. Generally, the statute of limitations to file a civil action at law is three years, with certain exceptions. Md. Code (1974, 2006 Repl. Vol.), Courts & Judicial Proceedings Article (CJP) § 5-101. "This statute of limitations reflects a legislative judgment of what is deemed an adequate period of time in which a person of ordinary diligence should bring his action." *Ali v. CIT Tech. Fin. Servs.*, 416 Md. 249, 257 (2010) (internal citations omitted).

i. Breach of Contract

Samuel alleges that in 2002, while he was married to Yenefanta, she pressured him into purchasing a new home and promised to get a job to help with expenses related to the new home, but she never sought employment. Additionally, Samuel alleges that in 2005, Yenefanta "abandoned her responsibility to manage and operate" the parties's jointly owned gas station, which was "in breach of her contract." After returning to work at the gas station in August 2005, Samuel claims Yenefanta once again left her responsibilities in January 2006.

Contrary to Samuel's allegations, all of these purported events occurred more than three years before his June 18, 2009 filing of the complaint and are therefore barred by the statute of limitations.

ii. Interference in parent child relationship

Next, Samuel claims that Yenefanta, "engaged in a malicious conduct to intentionally injure this Appellant using the parties' children." Even if we assume this is a recognized cause of action, the only date he included in his complaint was an event which occurred on July 10, 2005, more than three years before his complaint was filed. While Samuel later alleged at the hearing on the motion to dismiss that the malicious acts continued until he was forced to leave the country in December 2006, no reference to that date was included in the complaint.

iii. Defamation

Samuel alleged that Yenefanta,"engaged in a campaign to destroy the plaintiff's good name and business. Defendant falsely stated that she caught the plaintiff red handed when committing adultery. . . . As a result his business was damaged."

A *prima facie* case of defamation requires the plaintiff to prove the following elements, "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm." *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 442 (2009). Furthermore, unlike other claims, the statute of limitations in a defamation action is one year. CJP § 5-105; *Indep. Newspapers. Inc.,* 407 Md. at 441.

Samuel's pleading has failed to provide any basis for relief. First, Samuel did not identify any third party to whom Yenefanta made her alleged defamatory statements. Moreover, he did not include in the pleadings any specific harm he suffered as a result of the alleged conduct, other than the fact that "his business was damaged." Finally, he did not include any dates in his complaint as to when the alleged defamation occurred. Therefore, it was not an abuse of discretion for the circuit court to dismiss his complaint.

iv. Fraud and Misrepresentation

In his complaint, Samuel also made a series of allegations concerning Yenefanta's conduct during the

divorce proceedings. However, the conduct he alleged took place from 2003 through 2005, well outside the limitations period for this claim.

v. Theft

To support his claim of theft, Samuel alleges that in 2005, Yenefanta removed financial documents from the parties's homes and never returned items that he left in a vehicle registered in her name.[2] Like his claims of fraud and misrepresentation, Samuel's allegations of theft are barred by the statute of limitations.

vi. Malicious Prosecution and Abuse of Process

Samuel argues that Yenefanta maliciously prosecuted and/or abused process when she filed a Domestic Violence Complaint against him in September of 2008 in the Circuit Court for Montgomery County. A final protective order was entered in October 2008. Samuel also supports his claim with alleged conduct from 2005.

To bring a claim of malicious prosecution, a plaintiff must establish, through sufficient facts, "1) a criminal proceeding instituted or continued by the defendant against the plaintiff; 2) without probable cause; 3) with malice, or with a motive other than to bring the offender to justice; and 4) termination of the proceedings in favor of the plaintiff." *Carter v. Aramark Sports & Entm't Servs.*, 153 Md. App. 210, 227 (2003). In order to prevail on a claim of abuse of process, the plaintiff must show "I. the defendant wilfully used process for an illegal purpose; 2. to satisfy the defendant's ulterior motive; and 3. the plaintiff was damaged by the defendant's perverted use of process." *Id*. at 282.

With respect to Samuel's claim of malicious prosecution, he fails to show that he could meet the required elements for this tort. Turning to the fourth element mentioned in *Carter*, the plaintiff must prove, "termination of the proceedings in favor of the plaintiff." In the 2008 protective order proceedings, the circuit court ruled in Yenefanta's favor, making it factually impossible for Samuel to meet the elements of malicious prosecution.

Samuel's claim of abuse of process also fails. In his pleading, Samuel failed to allege any specific harm he suffered as a result of Yenefanta's alleged conduct in 2008. Further, as to the events alleged to have occurred in 2005, Samuel's claim is barred by the statute of limitations.

vii. Intentional Infliction of Emotional Distress, Unethical and Illegal Conduct that caused Emotional Harm and Economic Loss

The basis for Samuel's claim for intentional infliction of emotional distress and related causes of action are events which he claimed occurred in 1997, 2005, 2006. Like the other claims contained in his complaint, Samuel's contention is barred by the statute of limitations.

JUDGMENT OF THE CIRCUIT COURT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES:

1. The appellant's questions were presented as:

> I. The trail [sic] Court committed an error and abused its discretion by denying Appellant's request for default judgment.
>
> II. The Circuit Court committed reversible error and abused Its discretion by dismissing the appellants lawsuit despite the Fact that appellant has a legitimate cause of action[.]

2. When Samuel refers to "theft," we presume he means the tort of conversion, as there is no civil cause of action for "theft."

NO TEXT

Cite as 2 MFLM Supp. 17 (2012)

Child support: modification based on changed circumstances: voluntary impoverishment

Osama Mohamed

v.

Leticia Lusung

No. 0591, September Term, 2010

Argued Before: Eyler, James R., Watts, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Moylan, J.

Filed: December 8, 2011. Unreported.

The circuit court's finding of voluntary impoverishment gave due regard to the *Lorincz* factors and was not clearly erroneous; therefore, the denial of appellant's motion to modify child support based on changed circumstances was affirmed.

The pertinent facts that we can glean from the briefs and the record extract tell us that the appellant, Osama Mohamed, and the appellee, Leticia Lusung, were once married but are now divorced. The child of that marriage, Carlo Mohamed, was born on March 21, 2000. The divorce decree awarded physical custody of the child to the appellee.

Although there were earlier legal proceedings and court orders with respect to child support, our concern in this case begins with the order of Judge Robert A. Greenberg in the Circuit Court for Montgomery County on May 8, 2009, which ordered the appellant to pay to the appellee $1,333 per month for the child support of Carlo.

On July 29, 2009, the appellant filed a Motion to Modify Child Support downward, claiming that his income had been drastically reduced through no fault of his own. A hearing was held on that motion by Judge Ronald B. Rubin on December 3, 2009. At the conclusion of that hearing, Judge Rubin found that the appellant had voluntarily impoverished himself. Judge Rubin, accordingly, denied the Motion to Modify Child Support.

On December 15, 2009, the appellant filed a Second Motion to Modify Child Support. Following a hearing on that motion on April 3, 2010, before Judge Louise G. Scrivener, Judge Scrivener denied that motion. This appeal is from both of those denials.

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The appellant's first contention is that Judge Rubin was clearly erroneous in finding that he had voluntarily impoverished himself. We do not agree. At the conclusion of the December 3, 2009 hearing, Judge Rubin was meticulously careful in his findings of fact and in his analysis.

> This case is here today before me on the defendant's motion to modify child support. This is a guidelines case. Child support was determined most recently by Judge Greenberg of this court, and his order was entered on May 8th, 2009. As a result of Judge Greenberg's findings, Judge Greenberg ordered the defendant to pay guidelines support in the amount of $1,333 per month. I have reviewed Judge Greenberg's memorandum opinion. I have reviewed his order. And I have reviewed, as well, the guidelines calculation that was prepared apparently by Judge Greenberg personally in connection with his last order. The defendant comes before me today seeking to modify Judge Greenberg's order taking the position that he is unable to pay any child support.
>
> The Court has carefully considered all of the evidence adduced at trial, including the credibility of the parties and their witnesses. The trier of fact may believe or disbelieve, accredit or disregard any evidence introduced. In the case of any witness, the finder of fact properly may assign no weight and no credibility to a particular witness's testimony. In a bench trial such as this, the trial court is not only the judge of a witness's credibility but is also the judge of the weight to be attached to the evidence. As Judge Moylan said in State v. Brooks, 148 Md. App. at 402, "A fact finder does not have to believe that a witness is

lying to take a witness's testimony with a grain of salt."

The Court has listened carefully to the defendant's evidence. The Court finds as a first level fact that the defendant is not credible. The defendant is not an accurate reporter of facts or events. I have reviewed his 2008 earnings and find that in 2008 the defendant had earned income of $144,364, as reflected by either forms W-2 or forms 1099 submitted by the payors. I have reviewed, as well, his 2008 federal income tax return and find that his federal income tax return is inconsistent with the wages and other earnings that were reported federally by the employers. I find that his 2008 income tax return is false and materially so he has omitted to state the true and correct amount of his income, that he has filed a false federal income tax return. He has understated his income by thousands and thousands of dollars to the federal government. I find all that as a first level fact by a preponderance of the credible evidence.

The defendant first told me that he, in opening statement, he lost his business at the end of July 2009. The truth of the matter is that he sold a franchise, which at least on a cash flow basis was flowing cash, not red, was flowing cash black. The Court finds that as of June 2009 he had a ledger balance of $83,146.61. He added to that from June $21,785.29. At the end of June 2009, he had cash on hand, cash on hand of $104,900 and change. He has provided no cogent or credible explanation of what happened to the money.

In July of 2009, the defendant had a ledger balance, I find by a preponderance of the credible evidence as a first level fact, by July of 2009, the defendant had a ledger balance cash on hand of $131,557.35. He has provided no credible or cogible (phonetic sp.) or cogent explanation of what happened to that money, as well.

He says he's broke. I don't believe him. The Court finds he's hiding his money. He's hiding assets. He's falsely reporting income to the Internal Revenue Service. He has falsely testified to this Court.

He testified that he has no vehicle. The Court finds as a first level fact that he has a vehicle. It's a white Toyota Sienna van. The Court credits the testimony of the plaintiff in that regard in particular.

The Court finds that the defendant has knowingly, willfully, and voluntarily refused and neglected to pay child support. He has the money. He's simply not paying it over.

I have reviewed, in addition, Judge Moylan's recent decision, I'm going to mispronounce this, I'll spell it, R-, L-O-R-I-N-C-Z, 183 Md. App. 312, where Judge Moylan for the Court of Special Appeals reiterated and recounted the factors that a trial court must consider in a voluntary impoverishment case such as this.

Factor one, the physical condition of the defendant. He's in good health.

Factor two, the level of his education. He has a high school education and some college. And, I note, as well, he has substantial business acumen, because he persuaded, in 2008, Exxon Mobil, to pay him $102,249.03. Quite an accomplishment, for which he deserves credit. He's fully capable of earning substantial income

The timing of any change in employment or financial circumstances relevant to the case. The Court finds it more than serendipitous that after Judge Greenberg passed his order and it become effective, the defendant all of a sudden ran out of money, sold the business. He provided no cogent explanation. He actually provided no explanation at all as to what happened to the money, what happened to the franchise fees, what happened to anything. The Court finds it's a sham.

The Court next has to consider factor five, I'm sorry, factor four, the relationship between the parties. That is neutral in this case. The parties have been divorced for some number of years.

> Factor five, the defendant's efforts to find and retain employment. The defendant presented no cogent or credible evidence of any serious efforts to become employed. In fact, his testimony in that regard is unbelievable. If someone becomes without work in July or August of 2009, the Court knows of no cogent reason why one waits until November of 2009 to apply for unemployment. If you lose your job, if you're out of work, you sell your company, whatever, you apply right away. That's the Court's common experience. I see it every day. People don't wait four months to go without anything and finally in November apply for unemployment benefits. I find it more than highly suspicious. I find it incredible.
>
> Factor five, mentioning as well, the defendant testified that he's been constantly looking for work, but he's provided no supporting documentation, no serious evidence, no specific information. The Court finds he's not out looking for which he should get credit, but he does not do very well in paying child support, so he gets no credit in that regard.
>
> The Court finds that the defendant fulfills all of the requirements set forth by the Court of Appeals and the Court of Special Appeals for voluntarily impoverishment. Consequently, there being no material change in circumstance as defined in the Family Law Article Section 12-202(b), and there certainly being no change of 25 percent of more, the defendant's motion to modify is denied. Judge Greenberg's order is reaffirmed in its entirety.

We hold that Judge Rubin was not clearly erroneous.

The appellant's second contention is that Judge Scrivener was in error for dismissing his Second Motion to Reduce Child Support. After hearing from the appellant and from counsel for the appellee at the hearing on April 3, 2010, Judge Scrivener ruled:

> THE COURT: You need to call it a motion to reconsider, if that's what it is. That's not what your motion says.
>
> In any event, the motion to modify child support was filed only about a week and a half after the hearing in front of Judge Rubin.
>
> The Court is going to grant the motion to dismiss the motion to modify child support for this reason.
>
> You don't get three bites at the apple in the same year. And you just keep coming back and back and back saying modify it again, modify it again. You have to show a material change in circumstances. Your pleadings do not demonstrate a material change in circumstance from the evidence presented at the hearing at the end of December, so I am going to grant the motion to dismiss.

We see no error in that ruling.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

NO TEXT

Cite as 2 MFLM Supp. 21 (2012)

Child support: motion for modification: deficient request for a hearing

Timothy R. Dantoni
v.
Melissa Ann Dantoni

No. 1560, September Term, 2010

Argued Before: Zarnoch, Hotten, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Hotten, J.

Filed: December 8, 2011. Unreported.

Appellant was not entitled to a hearing on his motion to modify child support because the motion did not include a heading titled 'Request for Hearing,' as required by Md. Rule 2-311, and filing a separate 'Request for Hearing' did not remedy the deficiency.

Appellant, Timothy Dantoni, and appellee, Melissa Dantoni, were married on August 28, 1994, and two minor children were born of that union. Appellee filed for a limited divorce on August 24, 2009 in the Circuit Court for Anne Arundel County. On April 19, 2010, the circuit court entered a *pendente lite* order, requiring appellant to pay child support in the amount of $785 per month. The circuit court scheduled a merits hearing for August 20, 2010. Soon after the circuit court's *pendente lite* order, appellant alleged that his financial situation materially changed as a result of a significant loss in income that was through no fault of his own. On May 5, 2010, appellant filed a motion for modification of child support. On June 16, 2010, the circuit court denied appellant's motion without a hearing, stating: "All issues raised in [the] motion can be raised at [the] Merits Hearing and no need to reconsider exists."

On July 6, 2010, appellant filed a motion to reconsider, asking the circuit court to reconsider its June 16, 2010 order. The circuit court denied appellant's motion for reconsideration on July 15, 2010, again without a hearing, and the denial was entered on July 27, 2010. In its order, the court stated: "Denied as the Court will not reconsider the Pendente Lite Order." Appellant filed his appeal on August 9, 2010. Thereafter, on August 20, 2010, the court held the previously scheduled merits hearing, but did not address the merits of the case because it was on appeal.

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Appellant presents one issue, which we quote:

> 1. Was the Trial Court's denial of the Appellant's Motion for Modification of Child Support and Motion to Reconsider without granting the Appellant a hearing he requested, legally correct when Maryland Rule 2-311(f) requires the trial Court to hold a hearing before rendering a decision disposing of a claim or defense?

For the following reasons, we affirm the decision of the circuit court.

FACTUAL BACKGROUND

Two minor children were born during the marriage of appellant and appellee. Appellee filed for a limited divorce on August 24, 2009 in the Circuit Court for Anne Arundel County. The circuit court held a *pendente lite* hearing on April 15, 2010, and on April 19, 2010, the court entered a *pendente lite* order, requiring appellant to pay monthly child support in the amount of $785.

Appellant filed a motion for modification of that child support order on May 5, 2010. In the motion, appellant alleged that there had been material changes in circumstances that necessitated a modification of child support. Specifically, appellant stated that several days after the circuit court's *pendente lite* order, his income decreased by half when his employer reduced his position from full-time to part-time. Appellant also stated that he failed to obtain the additional employment he had been seeking. Appellant asserted that his reduction in employment was through no fault of his own. Appellant also requested a hearing on his motion in the "wherefore clause."

On June 16, 2010, the circuit court denied appellant's motion for modification, but stated: "All issues raised in [the] motion can be raised at [the] Merits Hearing and no need to reconsider exists." In response, on July 6, 2010, appellant filed a "Motion to Reconsider the Order Denying Defendant's Motion for Modification of Pendente Lite Order Regarding Child Support," in which he again requested a hearing in the "wherefore clause." However, on July 15, 2010, the cir-

cuit court denied appellant's motion for reconsideration, stating: "Denied as the court will not reconsider the Pendente Lite Order."

STANDARD OF REVIEW

Pursuant to Maryland Rule 8-131(c),[1] "[w]e review the circuit court's decision without deference to determine if errors of law exist." *Hill v. Hill*, 118 Md. App. 36, 40 (1997). "All factual findings of the circuit court, however, are entitled to deference and must be upheld unless clearly erroneous." *Id.*

DISCUSSION

Md. Code (2006), § 12-104 of the Family Law Article ("F.L.") allows a party to file a motion to modify child support upon the showing of a material change of circumstance. In his motion, appellant set forth the circumstances surrounding his substantially reduced income, attached an updated financial statement, and included a signed affidavit. Appellant argues that the circuit court legally erred by denying his motion for modification of child support without a hearing in contravention of Maryland Rule 2-311(f). Appellee did not file a brief.

When the motions at issue were filed in 2010, Maryland Rule 2-311(f)[2] provided:

> A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532,[3] 2-533,[4] or 2-534,[5] shall request the hearing in the motion or response under the heading "Request for Hearing." Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.[6]

As a preliminary matter, we observe that this appeal is timely and not premature. While the circuit court did not enter a final order or judgment in this case, an order entered by a circuit court in a civil case for "the payment of money[ ] or the refusal to rescind or discharge such an order" is immediately appealable. Md. Code (2006), § 12-303(3)(v) of the Courts and Judicial Proceedings Article ("C.J."); *see also In re Katherine C.*, 390 Md. 554, 560 (2006) (*pendente lite* child support order, though interlocutory, is appealable under C.J. § 12-303 because it required the payment of money); *Cannon v. Cannon*, 384 Md. 537, 545 n.1 (2005) (*pendente lite* award of alimony, though interlocutory, is an order to pay money and appealable under C.J. § 12-303(3)(v)); *Pappas v. Pappas*, 287 Md. 455, 462 (1980) ("Orders for the payment of alimony or child support are not expressly covered by the statute[,] [but] our cases make clear that such orders are orders '[f]or . . . the payment of money' under § 12-303.").

Appellant's argument can be addressed with two questions. First, did appellant request a hearing? Second, if appellant did request a hearing, was the circuit court's denial of the motion for modification of child support a decision that was dispositive of a claim or defense?

In *Hariri v. Dahne*, 412 Md. 674 (2010), the Court of Appeals reiterated the plain meaning interpretation of the Maryland Rules:

> With respect to the interpretation of the Maryland Rules, this Court has stated that, "[t]he canons and principles which we follow in construing statutes apply equally to an interpretation of our rules[.]" *State v. Romulus*, 315 Md. 526, 533, 555 A.2d 494, 497 (1989). In order to effectuate the purpose and objectives of the rule, we look to its plain text. *See Adamson v. Correctional Med. Servs.*, 359 Md. 238, 250-51, 753 A.2d 501, 507-08 (2000); *Huffman v. State*, 356 Md. 622, 628, 741 A.2d 1088, 1091 (1999). To prevent illogical or nonsensical interpretations of a rule, we analyze the rule in its entirety, rather than independently construing its subparts. *See Marsheck v. Board of Trustees of the Fire & Police Employees' Retirement System of the City of Baltimore,* 358 Md. 393, 403, 749 A.2d 774, 779 (2000). If the words of the rule are plain and unambiguous, our inquiry ordinarily ceases and we need not venture outside the text of the rule. *See Adamson*, 359 Md. at 280-81, 753 A.2d at 507-08; *Marsheck*, 358 Md. at 402-03, 749 A.2d at 779; *Huffman*, 356 Md. at 628, 741 A.2d at 1091.
>
> The venerable plain meaning principle, central to our analysis, does not, however, mandate exclusion of other persuasive sources that lie outside the text of the rule. *See Adamson*, 359 Md. at 252; *Marsheck*, 358 Md. at 403, 749 A.2d at 779. We have often noted that looking to relevant case law and appropriate secondary authority enables us to place the rule in question in the proper con-

> text. *See Adamson*, 359 Md. at 251-52, 753 A.2d at 508; *Marsheck*, 358 Md. at 403, 749 at 779.

Hariri, 412 Md. at 684 (quoting *Johnson v. State*, 360 Md. 250, 264-65 (2000)).

Appellant's first request for a modification of child support ("the first motion") was titled "Motion for Modification of Pendente Lite Order, Child Support." The first motion included an affidavit signed by appellant and an updated financial statement showing his reduced income. The first motion's only reference to a hearing was in the "wherefore clause" at the end of the motion where appellant "request[ed] . . . [t]hat this Motion be set for a Hearing. . . ."

Appellant's second request for a modification of child support was made through a motion for reconsideration ("the second motion") and was titled "Motion to Reconsider Order Denying Defendant's Motion for Modification of Pendente Lite Order Regarding Child Support." The second motion stated that the first motion "requested a hearing" and set forth the basis of the material changes in circumstances. The second motion averred that appellant believed the circuit court misconstrued the first motion for modification as a motion for reconsideration of the *pendente lite* order, pointing to the court's handwritten notation on the order that stated, "no need to reconsider exists." The second motion also sought clarification as to whether the court denied the first motion simply because the previously scheduled merits hearing date would be earlier than any practicably scheduled hearing on appellant's first motion and whether appellant could address his reduced income at the merits hearing. In the "wherefore clause," the second motion requested "[t]hat the Court clarify it's [sic] Order of June 29, 2010[7][,] [t]hat the Defendant's Motion for Modification be scheduled for Hearing at the same time as the merits hearing on August 20, 2010[,] [and] [t]hat a hearing be set on this Motion unless the requested relief is granted." Finally, on the same day he filed the second motion, appellant filed a separate document titled "Request for Hearing" with the Clerk of the Court. The "Request for Hearing" requested that the Clerk set a hearing on his "Motion to Reconsider Order Denying Defendant's Motion for Modification of Pendente Lite Order Regarding Child Support" unless the circuit court granted his requested relief without need for a hearing.

At the time appellant filed the first and second motions, Maryland Rule 2-311(f) did not require that the title of the motion include the request for hearing. However, the plain, unambiguous meaning of the rule did require that a party requesting a hearing "shall request the hearing in the motion or response under the heading 'Request for Hearing.'" The rule also stated that "the court may not render a decision that is dispositive of a claim or defense without a hearing *if one was requested as provided in this section*." Md. Rule 2-311(f) (emphasis added). Neither appellant's first motion nor appellant's second motion included a heading entitled "Request for Hearing." The "Request for Hearing" that appellant filed with the Clerk of the Court cannot be said to have been a part of either motion, and though it was filed on the same day as the second motion and the docket indicates that it was attached to the second motion, it cannot salvage the deficiencies in the motions. Therefore, the circuit court was not required to conduct a hearing based on appellant's failure to comply with Maryland Rule 2-311(f).

Since we conclude that appellant did not sufficiently request a hearing, we do not reach the issue of whether the circuit court rendered a decision disposing of a claim or defense. Even though we find that the court did not err, we note that the circuit court should forthwith schedule a merits hearing in this case, where appellant can raise his claim of material changes in financial circumstances prior to the court rendering a decision regarding permanent child support.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

FOOTNOTES

1. Maryland Rule 8-131(c) provides:

> **Action tried without a jury.** When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

2. Maryland Rule 2-311(f) was derived from former Rule 321 d, which in pertinent part stated that "[a] request for hearing shall be in writing and may be either in a separate pleading, or incorporated in the body of the demurrer, motion or reply at the end thereof under an appropriate heading." However, the Court of Appeals Standing Committee on Rules of Practice and Procedure notes indicate "that the purpose of Maryland Rule 2-311 is to consolidate in one paper the motion (or response), grounds and authorities, and a request for hearing[.]" The Court of Appeals Standing Committee on Rules of Practice and Procedure Meeting Minutes (November 16, 1976).

3. Motion for judgment notwithstanding the verdict.

4. Motion for new trial.

5. Motion to alter or amend a judgment — Court decision.

6. Effective July 1, 2011, Maryland Rule 2-311(f) has been

amended to include the requirement that "[t]he title of the motion or response shall state that a hearing is requested." According to the Court of Appeals Standing Committee on Rules of Practice and Procedure notes, the addition was to allow "judges and clerks to determine quickly whether a hearing is sought" because "parties often indicate[d] at the end of the motion, buried within the motion, or in attached exhibits that a hearing is requested."

7. Though dated June 16, 2010, the order denying appellant's first motion was entered on the docket on June 29, 2010.

Cite as 2 MFLM Supp. 25 (2012)

Evidence: child support: monetary award

Eric Case
v.
Laura Glynn

No. 2016, September Term, 2010

Argued Before: Eyler, James R., Zarnoch, Hotten, JJ.

Opinion by Eyler, James R., J.

Filed: December 15, 2011. Unreported.

In determining child support, the circuit court erred in substituting its calculation of the number of overnights the children spent with each parent for the parents' own stipulation. In fashioning the monetary award, the court erred in relying on hearsay evidence, which had been properly admitted for a limited purpose, as substantive evidence that the appellee's business had a value of zero.

In this divorce action between Laura Glynn, appellee, and Eric Case, appellant, the Circuit Court for Montgomery County, *inter alia*, granted appellee an absolute divorce and a monetary award in the amount of $150,000, and ordered appellant to pay $653 per month in child support. Appellant contends the court committed reversible error in determining both child support and the monetary award. We shall vacate the order with respect to child support and the monetary award and remand to the circuit court for further proceedings not inconsistent with this opinion.

Factual Background

The parties were married on June 24, 1995, and had three children. Before, during, and after the marriage, appellee owned and operated a computer technology company known at the time of the trial as Glynn Technologies. During the same period, appellant held several jobs and also went through periods of unemployment. Appellant was involved in litigation with one former employer during the course of the marriage, which resulted in a settlement in his favor for $625,000, part of which he collected during the marriage, part of which he collected while this case was litigated below, and part of which was outstanding at the conclusion of the trial. At the time of the trial, appellant was self-employed and sold insurance products through his company Better Benefits.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

We shall provide additional facts in our discussion as needed.[1]

Procedural Background

On December 4, 2007, appellee filed for absolute divorce and other relief. On February 14, 2008, appellant filed a counter-complaint. On September 1, 2009, the circuit court entered a consent order, providing, *inter alia*, for physical custody of the children, which, according to a stipulation by the parties, resulted in the children staying overnight with appellant 140 days a year and with appellee 225 days a year. The contested issues were tried from March 8, 2010 to March 15, 2010. On March 19, 2010, the court delivered its oral findings of fact and conclusions of law. On June 8, 2010, the court entered judgment. On October 15, 2010, after the parties filed motions to revise, the court issued an amended order. The court granted an absolute divorce, granted appellee a monetary award in the amount of $150,000, found appellant's income to be $94,000 per year, and required appellant to pay $653 per month in child support.

Questions Presented

Appellant presents the following three questions for our review:

> 1. Whether the Trial Court erroneously determined the parties' respective numbers of overnights with the children for purposes of determining child support.
>
> 2. Whether the Trial Court erred in determining Mr. Case's income for purposes of child support by finding Mr. Case had an income other than and in excess of his actual income without explaining its methodology and without finding that Mr. Case was voluntarily impoverished, and by improperly including litigation settlement proceeds in Mr. Case's income.
>
> 3. Whether the Trial Court erred in valuing Ms. Glynn's business by accepting hearsay testimony as sub-

stantive evidence, and by ignoring evidence concerning the value of the business based upon the most recent information provided by Ms. Glynn.

Standards of Review

Absent a misapplication of law, child support awards are within the sound discretion of the trial court. Knott v. Knott, 146 Md. App. 232, 246 (2002) (citations omitted). Accordingly, "[w]e will not disturb the trial court's determination as to child support, absent legal error or abuse of discretion." Jackson v. Proctor, 145 Md. App. 76, 90 (2002). A trial court may abuse its discretion "where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court." In re Adoption/Guardianship No. 3598, 347 Md. 295, 312 (1997) (citations and quotations omitted).

"With respect to the ultimate decision regarding whether to grant a monetary award and the amount of such an award, a discretionary standard of review applies. This means that we may not substitute our judgment for that of the fact finder, even if we might have reached a different result." Innerbichler v. Innerbichler 132 Md. App. 207, 230 (2000) (citations omitted). We will set aside such a judgment, however, when the underlying facts are clearly erroneous. Id.

"[A] circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*." Bernadyn v. State, 390 Md. 1, 7-8 (2005).

Discussion

With respect to the child support award, appellant argues that the court incorrectly determined both the number of overnight stays the children would have with each parent and the amount of appellant's annual income, upon which the court based the award. With respect to the monetary award, appellant argues that the court improperly considered hearsay evidence when fashioning the award and because the court failed to consider expert opinion evidence submitted on behalf of appellant

Child Support

Appellant argues that the court determined that the income of the parties was above guidelines, *see* Maryland Code (2006 Repl. Vol.), § 12-202(e) of the Family Law Article ("FL"), but extrapolated from the guidelines. In doing so, the court improperly calculated child support because it used its own calculation of overnights rather than the number stipulated to by the parties. The parties stipulated that appellant would have the children for 140 days a year and appellee would have the children for 225 days a year. The court stated, "I've calculated that, essentially, [appellant] has the boys 130 days a year and [appellee] has the boys 235 days a year." The court used the 130 and 235 day numbers on its child support worksheet, used to calculate the child support award.

Appellee notes correctly that the parties' combined monthly income, as determined by the court, exceeded the highest level in the child support guidelines, as of the time of trial. Appellee argues that the circuit court was not required to follow the guidelines in fashioning the child support awards.

We agree that the court was not required to do so. When "the parents' monthly combined adjusted actual income exceeds [the maximum], the Guidelines do not apply. Instead, the court may exercise 'its discretion in setting the amount of child support.' FL § 12-204(d)." Jackson, 145 Md. App. at 90 (citations omitted). Nevertheless, the court expressly based its award on an extrapolation from the guidelines. In doing so, it was obligated to use the number of overnights as stipulated to by the parties. The court's finding to the contrary was clearly erroneous.

In his second challenge to the child support award, appellant argues that the trial court based the award upon a clearly erroneous finding as to the amount of appellant's annual income. According to appellant, the court erroneously counted as income funds that appellant received in settlement of a lawsuit. The court erred, appellant argues, because FL § 12-201(b) provides an exclusive list of what constitutes "actual income" for child support purposes, and settlement proceeds are not among the sources of funds identified in that provision. In addition, appellant urges us to find that the court erred by averaging the settlement proceeds over four years when attributing them to appellant as income, and by counting loans from his mother as income. Finally, appellant argues that even if the court properly considered the various items discussed by the court, the amount did not total $94,000.

Appellee counters these arguments by asserting that the court found voluntary impoverishment and properly imputed potential income to appellant. Reciting a litany of factors that she asserts would support a finding that appellant was voluntarily impoverished, appellee suggests that we affirm the child support award on that basis.

We are not persuaded by appellee's arguments. We agree that a court can find, if evidence supports it, that a party has voluntarily impoverished himself or herself and impute potential income for purposes of ascertaining child support. A trial court considers a party's actual income "if the parent is employed to full capacity," and considers potential income only when "the parent is voluntarily impoverished." FL § 12-

201(h). The trial court's determination that a parent is voluntarily impoverished is a finding of fact. John O. v. Jane O., 90 Md. App. 406, 419 (1992). As a result, appellate courts will sustain such a finding if it is not clearly erroneous. Sause v. Sause, 194 Md. 76, 80 (1949). In order to affirm a child support award based on voluntarily impoverishment, we must be presented with a factual finding that the party indeed was voluntarily impoverished. *See* John O., 90 Md. App. at 423 ("The failure of the court, however, to find specifically that Mr. O. voluntarily impoverished himself necessitates a remand."). Here the trial court made no finding that appellant was voluntarily impoverished, and absent such a finding, we decline to affirm the child support award on that ground.

Moreover, as a foundational matter, the record before us simply does not provide an explanation for the amount of annual income, $94,000, that the court found to be appellant's income for purposes of child support. When announcing its determination of appellant's income,[2] the court stated:

> I've attributed $94,000 a year. That's based upon his testimony that he's involved in a growing business, is making $1,000 [a month] now, should be making $3,000 a month in about 18 months.
>
> I've looked at the settlement amount of $396,000. If I subtract the marital property award of [$150,000], that's $246,000. If he uses that money over the next four years to help support himself that's over $60,000 a year that he could use that money [sic]. That's assuming he does nothing over the next several years or doesn't go beyond $3,000 a month. So I have attributed $94,000 a year in income to Mr. Case.

We have not discovered, and appellee has not presented to us, any additional findings on the record by the court that would elucidate the process by which he arrived at $94,000. We cannot fashion an equation from any of the figures the court apparently considered that results in $94,000 a year in income for appellant. In another context involving financial calculations by a trial court, we stated that "we cannot determine the courts methodology and cannot conduct a meaningful review, and thus, we must remand for further proceedings." Ali v. CIT Tech. Fin. Servs., 188 Md. App. 269, 297 (2009). As we are unable to discern from the record the process by which the trial court arrived at appellant's income, we cannot affirm the child support award predicated upon that figure.

We need not, and indeed cannot, rule specifically on the propriety of counting as income assets, gifts, and loans because the court's findings are insufficient to permit meaningful appellate review. Nevertheless, we note that the court is not required to consider those items. *See* FL § 12-201 and Frankel v. Frankel, 165 Md. App. 553, 589 (2005).

In light of the trial court's error in calculating the number of overnights and because we have insufficient factual findings before us to evaluate the court's calculation of appellant's income, we cannot affirm the award of child support. We shall vacate the portion of the judgment ordering child support and remand to the trial court for further proceedings.

Monetary Award

The trial court found that appellee's business, Glynn Technologies, had no monetary value at the time of the divorce. Appellant alleges that the court impermissibly determined the value on the basis of hearsay testimony and erroneously excluded, as stale, other evidence showing a different value for the business. Appellee counters that the challenged testimony was used by the trial court for non-hearsay purposes and that the court's valuation of the business was supported by the evidence. As we find the court erroneously considered hearsay testimony in valuing Glynn Technologies, and because on remand the court may consider additional evidence, we need not address the staleness argument.

In each of the three years prior to trial, Glynn Technologies had gross revenues in excess of $1,000,000. During that time, the business was dependent upon one contract, with the Department of Health and Human Services ("HHS"), providing technology services to the agency. The company was initially awarded a three year contract with HHS in 2005. In 2008, the company submitted a successful proposal to continue working with HHS for another year, with HHS holding the option to renew the arrangement annually for each of the following four years. At the time of the trial, HHS had renewed its arrangement with the company through July 31, 2010.

In opening statement, counsel for appellee gave the following description of the state of Glynn Technologies as it stood at that time:

> [W]e are really looking at the end of her business because they don't think that this contract is going to be renewed.
>
> And, it's the government's sole and exclusive option. There have been multiple problems between the company and the government and the prognosis is grim. I don't know if you, I won't put a percentage on it but it

> doesn't look good. In fact, so bad that Ms. Glynn has already begun downsizing staff, eliminating vendors, giving up lease space and is looking at probably, most likely not having any work to do after July 31st on this contract and with the demise of this contract it is the demise of the business.

Appellee urged the court to attribute no value to Glynn Technologies because its contract with HHS had not been extended at the time of trial and allegedly was unlikely to be extended.

Appellee testified in her case-in-chief. She was asked what recent changes had occurred in Glynn technologies. She described the company as "gearing down" and then testified that "I have taken the position based upon what I've been told that the client [HHS] most likely — "at which point counsel for appellant objected. At the ensuing bench conference, counsel for appellant argued that appellee's statement was inadmissible hearsay, explaining that it "sounds like she's going into what the client was thinking, what the client wanted, what the client was going to do." Appellant's counsel further argued that "[i]f she's saying this is what it is, I'm gearing down because I have no value, that's something that's based on hearsay." The statement was admissible, according to counsel for appellee, because appellee "is trying to tell you why she thinks there's trouble or knows there's trouble now and what she's doing in reaction to it [and why]." The court apparently sided with appellee, overruling the objection and holding it admissible for the purpose of showing why she thought there was trouble.

Following the bench conference, appellee testified that "our contract is most likely not going to be renewed. [HHS was] going to send it out for a recompete which tells me as being in this business for 18 and a half years that we're done." Appellee subsequently explained that her previous contract officer at HHS had left that position in order to have a baby and that a different contract officer was evaluating the possibility of renewing the contract. Appellee testified that "it looks like [the new contract officer] is going to," and an objection was sustained. During re-direct examination, appellee was asked about the company's contract with HHS and testified over objection that "[t]hey're trying to cancel it, yes."

In closing argument, appellee's counsel urged the court to attribute no value to the company, arguing that Glynn Technologies had no interested potential buyers, and thus no value, because the company was unlikely to be extended again by HHS and, accordingly, would go out of business.

The court apparently agreed with appellee's argument and found the business had no value. In its ruling, the court explained its rationale:

> [T]here's many different ways you can value this company, asset approach, market approach, income approach. The significant problem with the valuation of this company at this time is that the testimony was basically that it's a one contract company. There are small contracts that generate a little bit of income, but there's no significant income beyond this one contract. And the testimony was that it was a renewable contract which in the past had been renewed consistently.
>
> However, apparently things changed in January of 2010 when the contract officer, who had been in charge of this contract, had a baby, decided not to return and a new officer was put in charge of this contract. **And Glynn Technologies was notified that their contract was not going to be renewed and it was going to be put up to bid, essentially ending the income stream in this company in June of this year.**
>
> Clearly, the market approach would be inappropriate in this case because **a company with one contract with no income has no market value.**
>
> The problem with the income determination of this case is **that income is ending in June** and there was no current information about what the income would be.

(emphasis added). The court based its finding that Glynn Technologies had no current value upon its conclusion that the company's contract with HHS would not be renewed in the future.[3] The court concluded that, absent the contract and a corresponding income stream the only valuation approach that was applicable was the asset approach. The court then found that the evidence was insufficient to show that the value of assets exceeded the amount of debt.

It appears the court admitted appellee's testimony as to the likely termination of Glynn Technologies contract with HHS for a limited purpose, to explain appellee's actions, but then relied on the truth of the expected nonrenewal for purposes of valuation. In its findings, the court stated that the company would not have income after the current HHS contract ended, concluding implicitly that the contract would not be renewed. Thus, the court admitted the challenged evidence for non-hearsay purposes but ultimately considered that testimony as proof of the matter asserted.

This was error. Accordingly, we shall vacate the monetary award and remand to circuit court for further proceedings.

Remand

For purposes of remand, we note, in addition to above, that the court's treatment of the settlement proceeds is unclear. When discussing alimony, the court addressed appellant's income and referred to actual income in the amount of $12,000 per year with an expected actual income in the amount of $72,000 per year within 18 months. The court also found that appellant would use some of the settlement proceeds for his own support; in other words, the court treated some of the proceeds as income. In discussing the monetary award, the court also found that appellant would use a "significant portion" of the settlement proceeds for his own support until his business was more profitable. In determining income for child support, the court found that appellant would use $60,000 per year for his support, treating it as income. At the same time, the court treated the entire amount of the proceeds received or to be received after 2007 ($346,000) as an asset. Thus, it appears the court treated the settlement proceeds as current income and an asset at the same time.

Upon remand, the trial court can clarify the above. In its discretion, the court may receive additional evidence. We have held previously that both equitable principles and the plain language of FL § 8-205 require a trial court upon remand of a monetary award to consider anew the economic circumstances of the parties as they exist at the time of remand. Fuge v. Fuge, 146 Md. App. 142, 176-7 (2002). As we explained in Fuge,

> the plain language of FL 8-205(b)(3) mandates that the trial court consider the parties' economic circumstances at the time the award is made. We also hold that the trial court must keep in mind all eleven of the section 8-205(b) factors upon remand. The modification of an original monetary award on remand is still an "award," triggering consideration of the section 8-205(b) factors.
>
> It is logical that a trial court be required to reconsider the section 8-205(b) factors, even in a case such as this, where it essentially is revising an earlier monetary award. The weight that a court gives to the section 8-205(b) factors, and the size and nature of its ultimate award, may depend on the amount of marital property to be distributed.
>
> When the extent of the marital property has changed due to an appellate decision, the trial court should rethink whether its original method of allocation is still "equitable" in light of the new circumstances. Further, the court must carefully consider whether there have been any other changes in circumstance since its original award that may have caused the equities to shift, justifying a different allocation of the marital property.
>
> Trial judges should not be encouraged to simply take out their rubber stamps when faced with a remanded monetary award, automatically allocating the new marital property amount in the same manner as in the original award. To do so could result in inequitable and unjust awards.
>
> While we sympathize with Ms. Fuge's argument that she should not be penalized for noting an appeal from the original judgment, we conclude that requiring a reconsideration of the section 8-205(b) factors to ensure an equitable award is not a penalty. It instead ensures justice. While she may feel penalized by reconsideration, it would be an affront to justice to allow her to benefit from any windfall she might be afforded if the court did not take a fresh look at the parties' circumstances to ensure the "equitable" award that the law requires.

Id. Our reasoning in Fuge applies equally in the case before us. Because we have vacated the monetary award; it is unknown whether the court will treat the settlement proceeds as an asset or income; it is unknown whether and to what extent settlement proceeds were consumed; Glynn Technologies was the source of appellee's income at the first trial and its continued existence, or not, will be relevant to a determination of appellee's income and valuation of marital property, the court should consider facts and circumstances as they exist at the time of the hearing for all purposes relevant to a determination of child support and monetary award.

APPELLANT'S MOTION TO STRIKE PORTIONS OF APPELLEE'S BRIEF DENIED. ORDER AWARDING CHILD SUPPORT AND A MONETARY AWARD VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR

MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. In his reply brief and by separate motion, appellant contends that appellee's brief includes facts not in the record. We are mindful that "an appellate court must confine its review to the evidence actually before the trial court when it reached its decision."

Cochran v. Griffith Energy Serv., 191 Md. App. 625, 663 (2010). Accordingly, as is our practice, we have limited our review to those facts contained in the record. We shall deny appellant's motion.

2. Appellant settled his lawsuit for $625,000. He received $176,000 in 2007, and during the course of this litigation, appellant received $100,000, $50,000 was paid into court. Appellant expected to receive another $346,000 in April, 2010.

3. Both parties called expert witnesses who discussed the various methods by which the company's value could be estimated.

Cite as 2 MFLM Supp. 31 (2012)

Child custody and visitation: change in permanency plan: adoption by non-relative

In Re: Juliana B.

No. 638, September Term, 2011

Argued Before: Eyler, Deborah S., Kehoe, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 21, 2011. Unreported.

The juvenile court had broad discretion to conclude that a change in permanency plan to adoption with a non-relative was in the child's best interest, given the mother's consent, the father's incarceration, the inappropriateness of the relatives offered as resources, and the fact that the child had lived with her foster parents her whole life and had bonded with them.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

This appeal is from the order of the Circuit Court for Washington County, sitting as a juvenile court, changing the permanency plan for Juliana B., a child adjudicated in need of assistance ("CINA"), from reunification with her natural father, Louis G., the appellant, to adoption.[1]

The order changing Juliana's permanency plan was issued on April 4, 2011, following a March 31, 2011 permanency plan review hearing. The juvenile court found that it would be in Juliana's best interest to change her primary permanency plan from reunification to adoption, with a secondary plan of relative placement. On May 2, 2011, the appellant noted a timely appeal of the juvenile court's order.[2] The appellee in this Court is the Washington County Department of Social Services ("the Department").

The appellant raises one question for review: Did the juvenile court err in changing the permanency plan from reunification to adoption? Finding no error or abuse of discretion, we shall affirm the juvenile court's order.

FACTS AND LEGAL PROCEEDINGS

Juliana was born on October 8, 2009, to Tamara B. while Tamara B. was incarcerated at the Washington County Detention Center ("WCDC"), serving a one-year prison sentence on forgery charges. At birth, Juliana was suffering from a strep infection. She was removed from her mother and spent the first seven days of her life at Washington County Hospital on a course of antibiotics. On October 15, 2009, Juliana was placed in emergency shelter care at the hospital in the custody of the Department. At that time, Tamara B. stated she intended to put the child up for adoption.

The appellant also was incarcerated at the WCDC at the time of Juliana's birth, awaiting sentencing on armed robbery charges, as well as a trial scheduled for January 2010, on pending charges of solicitation of first-degree murder and intimidating a juror. He did not consent to Tamara B.'s plan of adoption, and instead sought to have Juliana placed with one of his relatives.[3]

On November 12, 2009, when Juliana was one month old, the juvenile court adjudicated her a CINA,[4] and gave the Department legal and physical custody of her. The juvenile court also granted the Department limited guardianship of Juliana for purposes of medical, mental health, educational, and dental decision-making on her behalf. Juliana had been placed in a licensed foster home in Hagerstown from the time she was discharged from the hospital in October 2009. She has remained there ever since. Her foster parents, Crystal and William R., have, throughout these proceedings, voiced a desire to adopt Juliana.

Prior to an April 15, 2010 CINA review hearing, the Department prepared a report for the court, which stated that Juliana was doing "great" in her foster home placement; was bonding with her foster parents; and was receiving excellent care. She had had no contact with either natural parent since birth and therefore had not developed any attachment to either of them. At that time, both parents remained incarcerated.

In its report, the Department detailed its investigation of Maria B., the appellant's aunt,[5] as a possible resource for Juliana's placement. The Department explained that it had ruled her out after receiving information from the appellant that the B. Family was involved in drug and gang activity and that he did not want Juliana placed with Maria B. The Department also investigated Iris G., the appellant's cousin, who lived in Massachusetts. It ruled Iris G. out as a resource because she was unemployed and could not financially support Juliana. In addition, Juliana's mother did not want Juliana to live so far away from

Maryland.

Following the April 15, 2010 hearing, the court continued Juliana's placement in out- of-home foster care in the legal care and custody of the Department. It ordered a permanency plan of reunification with the appellant, which called upon him to provide within 30 days a further list of his relatives who might be a resource for Juliana's placement.

The juvenile court held another CINA review hearing on September 30, 2010.[6] The Department's September 20, 2010 court report reiterated that Maria B. had been ruled out as a placement resource after the appellant stated he did not want Juliana placed in her home.[7] In addition, Maria B. advised that she did not have enough money to purchase a crib for Juliana, and said she might allow Juliana to live with the appellant's biological mother, who had a long history with drugs and incarcerations. The appellant's Massachusetts cousin, Iris G., had been officially ruled out because the Massachusetts Community Care Services had denied the placement due to Iris's unemployment and lack of financial resources to care for a child.

Although the Department was of the view that the appellant's grandparents/adoptive parents — Felicia and Elieso G. — were too elderly and unhealthy to care for a toddler, at the appellant's request, it sent them a letter asking them to contact the assigned social worker if they were interested in being considered as a placement resource. They did not contact the social worker. The Department also contacted the appellant's two relatives in New York — cousin, Dioni G., and aunt, Rina G. — but neither expressed a desire to be considered as a resource for Juliana's placement.

Following the September 30, 2010 hearing, despite Tamara B.'s continued desire for Juliana to be adopted and the Department's elimination of the appellant's relatives as resources for Juliana's placement, the juvenile court denied the Department's request for a change in the permanency plan to adoption. Instead, the court continued the permanency plan of reunification and directed the Department to re-explore and update the appellant's family resources.

At a December 16, 2010 permanency plan review hearing, Tamara B. testified that she had consented to the proposed change in permanency plan for Juliana to adoption, with a concurrent plan of relative placement with her own parents, should the foster parents, Crystal and William R., become unavailable for adoption. The appellant, who still was serving a 20-year sentence, refused to consent to a plan of adoption; instead, he sought a permanency plan of relative placement, with a secondary plan of reunification, in the hope that his pending application for leave to appeal to this Court would be granted and his convictions reversed.

Maria B., the appellant's aunt, testified that she was ready, willing, and able to be a placement resource for Juliana. She stated that she was unemployed, lived in Section 8 housing, and had a foster daughter in her care, along with a former foster daughter she had adopted. Her 22-year-old biological daughter, Crystal C., also lived with her. In addition, because she was a diabetic and had suffered a heart attack (which had necessitated quadruple bypass surgery), her only income was $1,059 per month in disability payments. She also reported problems walking and running. She denied the appellant's then-recanted allegation that either she or her daughter was involved in drug or gang activity.

Crystal C., Maria B.'s daughter, testified that she was a full-time student working toward her associate degree in nursing. Although she was aware she was not then a placement resource for Juliana, she was willing to be considered a resource if her mother were to become unable to fulfill those duties. She believed her family would be willing to help financially with Juliana's care. She denied ever having been involved in drug or gang activity, as the appellant previously had alleged.

In closing, the attorneys for the Department and for Juliana contended that Juliana's best interest would be served by a change in permanency plan to adoption. (As noted, Tamara B. had consented to that change.) The appellant's counsel argued that such a change would be inappropriate so long as family members were ready, willing, and able to provide care for Juliana.[8]

Although acknowledging that "[i]t's time to move on and change the permanency plan to adoption," the juvenile court declined to do so at that time. Instead, it continued Juliana's placement with her foster parents, continued the permanency plan of reunification, and ordered a further review in six months' time, partly to give the appellant's application for leave to appeal time to work its way through this Court. The court waned that, at the next review hearing, unless good cause were shown, the permanency plan would be changed to adoption.

On March 31, 2011, the juvenile court held another permanency plan hearing. Once again, Juliana's attorney, the Department, and Tamara B. all advocated in favor of a change in the permanency plan to adoption; but the appellant opposed any such change. The court heard the following testimony.

Becky Rice, the Department caseworker assigned to Juliana's case since her birth, stated that Juliana was doing "beautifully" in the foster home of Crystal and William R., adding that she was on track

developmentally and emotionally and that the Department had no concerns about the placement. Crystal and William R. remained an adoptive resource for Juliana.

Ms. Rice again reviewed the paternal relatives the Department had considered as resources, including Maria B., Elieso and Felicia G., Iris G., Dioni G., and Rina G., all of whom had been ruled out for the reasons stated at the earlier hearings. No new evidence about those potential resources was presented.

Tamara B. testified that she supported the continuation of Juliana's placement with the R.s and would consent to their adoption of Juliana. She described her relationship with the R.s as "beautiful" and said she was pleased they wanted her to be a part of Juliana's life. She strongly opposed Juliana's placement with Elieso and Felicia G. or with Maria B. and Crystal R., saying that, if the court did not change the permanency plan to adoption, she would explore reunification over relative placement.

Crystal R. testified that she thought it would be against Juliana's best interest to be removed from the only home she had ever known. Ms. R. testified that when Juliana first visited Maria B. it caused her to exhibit stranger anxiety; and that Juliana had no interest in interacting with Maria B. Ms. R. said, however, that were she and her husband to adopt Juliana, they would "absolutely" be open to allowing Juliana's extended family to occupy roles in the child's life, assuming that would be in her best interest.

At the Department's request, Dr. Carlton Munson, a psychologist accepted as an expert by the court, performed a study of Juliana to determine her attachment to her foster parents. He recommended that Juliana remain with the R. family. In Dr. Munson's opinion, a compelling reason would be required to support a change in placement of Juliana at her stage of development and with her emotional attachment to the R.s, and there was none in Juliana's situation. A change in placement for Juliana would result in psychological harm.

Maria B. again testified that, despite her physical disabilities and lack of employment, there was nothing to preclude her from caring for Juliana. She stated that she babysits for her three grandchildren, ages 7, 6, and 1, often overnight, with no trouble. She said it was her wish to have Juliana come live with her because "a family should unite, to be together."

Finally, the appellant testified. He conceded that, due to his incarceration, it was unlikely he would be a resource for Juliana in the foreseeable future, but expressed his continued desire that she be placed with Maria B. If that were not possible, he said, he would favor placement with Tamara B.'s relatives over adoption, preferring any family member to outsiders.

After detailing the facts and testimony, the juvenile court ruled:

> Considering all the factors, I would be remiss in not changing this permanency plan. We are here for the best interests of the child. However, I do think reunification is totally out of the question based on the father's incarceration, even if he's successful, continued incarceration for say, let's say another two to three years. So I don't think reunification is realistic. The mother doesn't want it. So that takes care of that.
>
> So basically I'm changing—The child has been in care for 18 months doing well, the permanency plan is changed to adoption, however there will be a secondary plan of relative placement. If we are going to keep running that flag up the pole, we'll do it. However, the permanency plan is changed to adoption and we are going from there. And I don't know, if there are any other relative resources, they better be known within the next 24 hours[9] because if this case comes up for a guardianship hearing, for termination of parental rights and we are going to argue, we are going to raise the flag of relative resources, I don't want them raised at that hearing, if we get to that point which I don't know whether we will. Permanency plan is change[d] to adoption.

In its written order, the juvenile court additionally ordered the Department to file a petition for termination of parental rights ("TPR") within 30 days.

DISCUSSION

The appellant contends the juvenile court erred in changing the permanency plan to adoption with a secondary plan of relative placement, as he had presented to the court relatives who were ready, willing, and able to take custody of Juliana. He maintains that, under the relevant statutes, the Department was required to facilitate a relative placement, and the court should have so ordered. The Department disagrees, averring that the juvenile court permissibly exercised its broad discretion in concluding that a change in permanency plan to adoption would be in Juliana's best interest, given the mother's consent to adoption, the father's continued incarceration, the inappropriateness of the father's relatives as resources, and the fact that Juliana had been in her

foster care home her entire life and had bonded with her foster parents.

It is well settled that a parent's liberty interest in raising his or her children as he or she sees fit, without undue influence by the State, is a fundamental right protected under the Fourteenth Amendment to the U.S. Constitution. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *In re. Yve S.*, 373 Md. 551, 565 (2003). Maryland courts have consistently declared a parent's Fourteenth Amendment liberty interest in raising a child a fundamental one that cannot be taken away unless clearly justified. *Wolinski v. Browneller*, 115 Md. App. 285, 298 (1997), *overruled on other grounds by Koshko v. Haining*, 398 Md. 404 (2007).

A parent's liberty interest in raising his or her child is not, however, absolute. The State is given a wide range of powers with which to limit parental freedom and authority when a child's welfare requires it. In the context of disputes over children, "the State's interest is to protect the child's best interests as *parens patriae* — a derivation of the State's interest in protecting the health, safety, and welfare of its citizenry." *Wolinski*, 115 Md. App. at 300. A due process analysis thus requires the balancing of all the competing interests involved in the litigation.

Generally, the presumption of law and fact is that it is in the best interest of a child to remain with his or her parents. The presumption is rebutted, however, if the State shows that a parent is unfit or that exceptional circumstances exist that would make continued custody by the parent detrimental to the best interest of the child, the ultimate governing standard. *In re Adoption/Guardianship of Rashawn H. and Tyrese H.*, 402 Md. 477, 495 (2007); see also *In re Adoption/Guardianship of Ta-Niya C.*, 417 Md. 90, 100-12 (2010). There is no question in this matter that the appellant, due to his lengthy and continuing incarceration, cannot maintain custody of or provide for Juliana, and the mother, Tamara B., has made known since Juliana's birth that she wants Juliana to be adopted.

The Maryland General Assembly enacted a comprehensive statutory scheme to address situations in which a child is at risk because of his or her parents' inability or unwillingness to care for him or her properly. *In re Adoplion/Guardianship No. 10941*, 335 Md. 99, 103 (1994). Title 5 of the Family Law Article ("FL") of the Md. Code (1984, 2006 Repl. Vol., 2011 Supp.) governs the custody, guardianship, adoption, and protection of children who come to the attention of local departments of social services.

If, as here, the juvenile court determines that a child is a CINA, it has the discretion to grant custody of the child to a parent, a relative or other individual, or a local department. It may also order the child committed to the local department on terms it finds appropriate until custody is terminated by the court or the child reaches the age of twenty-one. CJP § 3-819. When a child is committed to a local department of social services, that department is required to develop and implement a permanency plan that is in the best interests of the child. FL § 5-525. The implementation of a permanency plan is an integral part of the statutory scheme designed to expedite the movement of children from foster care to a permanent living arrangement. *In re Joseph N.*, 407 Md. 278, 285 (2009) (citing *In re Damon M.*, 362 Md. 429, 436 (2001)).

At a permanency plan hearing, the juvenile court must determine the permanency plan, which, to the extent consistent with the best interests of the child, may be, in descending order: reunification with a parent or guardian; placement with a relative for adoption or custody and guardianship; adoption by a non-relative; custody and guardianship by a non-relative; or another planned permanent living arrangement. CJP § 3-823. In determining the permanency plan that is in the best interest of the child, the court must consider the six factors specified in FL section 5-525(f)(1), which are:

> (i) the child's ability to be safe and healthy in the home of the child's parent;
>
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
>
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
>
> (iv) the length of time the child has resided with the current caregiver;
>
> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
>
> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

The plan, once established, may be changed only if the court determines that it is in the child's best interest to do so. *In re James G.*, 178 Md. App. 543, 571 (2008).

The appellate standard of review of a juvenile court's decision to change a permanency plan is abuse of discretion. *In re Yve S.*, 373 Md. at 583. Abuse of discretion is found "where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (internal citations omitted). Taking all the foregoing into account, we turn to a

discussion of the particulars of the instant case.

Juliana was born to Tamara B. while Tamara was incarcerated. The appellant, too, was incarcerated when Juliana was born, and, as of the time of the March 2011 permanency plan hearing, he faced the remainder of a lengthy prison sentence.

From Juliana's birth and at all relevant times during the pendency of this matter, Tamara B. has stated that she would sever her parental rights to Juliana so Juliana can be adopted by the R.s, with whom Juliana has lived since she was one week old. The R.s have provided excellent care for Juliana, and they have a strong desire to adopt her. The appellant, concededly, cannot be a resource for Juliana. He advocates, however, that she should be placed with one of his relatives, arguing that, under the statutory scheme, relative placement must take precedence over adoption by a non-relative.

While relative placement does, in general, take precedence over adoption by a non-relative, the appellant misses the overriding principle of the best interest of the child. In this case, the Department determined that it would *not* be in Juliana's best interest to be placed with any of the relatives put forth as resources. The Department adequately detailed for the court its reasons for refusing to support any of those relative placements. The appellant was given every opportunity to provide the Department with relatives to be considered for Juliana's placement; and the record reflects that the Department diligently considered each suggested relative resource.

Juliana's grandparents, Felicia and Elieso G., were considered and ruled out because of their ages — 85 and 71, respectively — and the fact that Felicia suffers from dementia and requires extensive care by Elieso. The appellant's Massachusetts cousin, Iris G., was ruled out because of Tamara B.'s discomfort with her distance from Maryland and because the Massachusetts counterpart to the Department denied the placement due to Iris's unemployment and lack of financial resources to care for a child. A cousin, Dioni G., and an aunt, Rina G., in New York, were ruled out because neither responded to the Department's request to contact it if either was interested in being a resource for Juliana.

The only seemingly viable candidate from among the appellant's proffered family members was his aunt, Maria B. Maria B. was the most thoroughly considered and investigated possible resource. The Department determined that she, too, was not an appropriate resource for Juliana. First, the appellant himself originally said that he did not want Juliana placed with Maria B. and her daughter, Crystal C., because of alleged drug and gang activity occurring in their house. He later recanted that accusation, insisting he was simply angry at them for failing to visit him in prison; the damage was done, however. While his accusation lingered, the Department did not consider Maria B. a resource, and Juliana remained for those extra months in the foster care system.

Furthermore, Maria B., who had suffered a heart attack several years earlier, was 56 years old at the time of the March 2011 hearing. She is a diabetic who requires several medications and has trouble walking. Her only income is her disability payment of $1,059 per month. While she said that she is physically able to care for her three grandchildren, those children do not live with her on a full-time basis. As the juvenile court judge noted, "it's one thing to have visits, it's the other thing to have a child reside in your house who is 18 months old." In addition, Juliana has met Maria B. only one time, and Maria B. remains a stranger to her.

Dr. Munson opined that Juliana is securely bonded to her foster parents and that, in his professional opinion, removing her from them for less than a compelling reason — which he did not find — would have a negative impact on her development.

At the March 31, 2011 permanency plan review hearing, the court ordered a change in the primary permanency plan to adoption, with a secondary plan of relative placement, should the appellant be able to provide the Department with another potential relative placement within one week. In doing so, the court considered the six factors required by FL section 5-525 in establishing or changing a permanency plan, which we summarize:

> 1.) Child's ability to be safe and healthy in parents' home: The court found no ability to release the child to either parent's home, as Tamara B. indicated a desire not to have custody of Juliana, and the appellant is incarcerated and likely to remain so for the foreseeable future.
>
> 2.) Child's attachment to natural parents and siblings: Juliana has never met either of her parents. Tamara was given the opportunity to visit with Juliana but chose not to do so, and the Department deemed it inappropriate for a toddler to visit the appellant at a maximum security prison. Tamara B. consented to Juliana's adoption by her foster parents.
>
> 3.) Child's attachment to current caregiver: The court found that Juliana was "doing well and has bonded well with the foster home."
>
> 4.) Length of time the child has resided with the caregiver: Juliana has

> lived continuously with her foster parents, Crystal and William R., since shortly after her birth.
>
> 5.) Potential harm to child if moved from current placement: Dr. Munson opined that removal from the only home she has known would have a strong negative impact on Juliana's continued development. No other placement proposed by the appellant was deemed acceptable by Tamara B. or the Department.
>
> 6.) Potential harm to child in remaining in State custody for excessive period of time: No evidence was presented, and the court made no specific finding, as to the harm to Juliana in remaining in State custody for an excessive period of time.

Upon considering and weighing all the factors, including the mother's consent to adoption, the father's lengthy and ongoing period of incarceration, the strong bond between Juliana and her foster parents, the foster parents' desire to adopt Juliana, the length of time that Juliana has been in the foster parents' care without ever having met her biological parents, the Department's recommendation of adoption, Dr. Munson's testimony that removing Juliana from her current placement would be detrimental to her development, and the inappropriateness of each relative put forth by the appellant as a potential resource for Juliana, the court ruled it "would be remiss in not changing this permanency plan. We are here for the best interests of the child." It thus ordered the change of primary permanency plan to adoption.

No argument put forth by the appellant persuades us that the court abused its discretion in its ruling. All the factors noted above, which were considered by the juvenile court, support our conclusion that the court did not err or abuse its considerable discretion in cogently reasoning that changing Juliana's permanency plan to adoption was in her best interest.

ORDER OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

FOOTNOTES

1. Tamara B. is Juliana's natural mother. At the March 31, 2011 permanency plan review hearing at issue in this matter, Tamara B. consented to the recommended change in permanency plan to adoption. Tamara B. is not a party to this appeal.

2. An order changing a permanency plan for a child adjudicated CINA is an appealable interlocutory order pursuant to Md. Code (1974, 2006 Repl. Vol., 2011 Supp.), § 12-303(3)(x) of the Courts & Judicial Proceedings Article ("CJP"), which allows an appeal from an interlocutory order depriving a parent "of the care and custody of his child, or changing the terms of such an order." *In re Ashley E.*, 158 Md. App. 144, 160 (2004), *aff'd*, 387 Md. 260 (2005).

3. The appellant was not listed as Juliana's father on her birth certificate, but a subsequent court-ordered paternity test proved that he was her father.

4. Pursuant to CJP section 3-801(1), a "Child in need of assistance" means

> a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

5. Maria B. is the daughter of the appellant's grandparents, Felicia and Elieso G. Felicia and Elieso G. adopted the appellant, so Maria is his adoptive sister, as well as his aunt.

6. By the time of the September 30, 2010 hearing, Tamara B. had been released from prison and was employed by Good Will Industries and IHOP restaurant. She chose not to visit with Juliana upon her release from prison, continuing to seek Juliana's adoption by her foster parents. Louis G. remained incarcerated on a 20-year sentence and, despite his request for visitation with Juliana, the Department deemed it unsafe and inappropriate for the child to visit a maximum security prison.

7. In an affidavit dated August 20, 2010, the appellant recanted his accusation against Maria B., stating that he had lied about drug and gang activity in her home because he was angry she had not visited him in prison.

8. By this point in the proceedings, the juvenile court had summarily declined to consider the appellant's grandparents/adoptive parents, Felicia and Elieso G., as a resource for Juliana, given their ages of 85 and 71 and Felicia's health problems.

9. Shortly thereafter, at the request of the appellant's attorney, the court changed the amount of time in which the appellant could offer another relative placement to one week. He did not do so.

Cite as 2 MFLM Supp. 37 (2012)

Custody and visitation: exceptions to master's recommendations: failure to appear at hearing

Nathaniel M. Costley, Sr.

v.

Christina Steiner

No. 2817, September Term, 2010

Argued Before: Matricciani, Hotten, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: December 27, 2011. Unreported.

The circuit court did not err in declining to modify the custody and visitation order or to grant appellant's motion for reconsideration after he failed to appear at the hearing on the exceptions to the master's findings and recommendations; nor did the court err in awarding attorneys' fees or in ruling on the exceptions.

Appellant, Nathaniel M. Costley, Sr., and appellee, Christina Steiner, are parents of a minor child born March 16, 2002. In an order dated April 9, 2003, the Circuit Court for Carroll County awarded appellee sole physical and legal custody of their child and awarded appellant visitation rights. On September 8, 2009, appellant moved to modify custody. A master heard the motion on January 28, 2010, and on March 26, 2010, issued a set of written findings and recommendations. The master recommended that appellant be given the right to overnight visitation on Mondays when the child is not in school, "as agreed to by the parties," and that appellant should be granted the right "to make limited legal decisions solely with regard to the child's sports activities provided it does not adversely affect the child's school work or attendance or create long travel distances." The master recommended that appellant's other requests be denied.

On April 6, 2010, appellant filed exceptions to the master's findings and recommendations, and requested a hearing thereupon. On April 12, 2010, appellee also filed exceptions and requested a hearing. On June 10, 2010, the court issued notice that it would hear both parties' exceptions on July 15, 2010. On June 17, 2010, appellee requested a postponement of the July 15 hearing, which the court granted on June 24, 2010. The next day, June 25, 2010, the court issued notice that it would hear the parties' exceptions on November 18, 2010.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

Appellee moved to dismiss appellant's exceptions on November 16, 2010, arguing that appellant had not served appellee with a transcript of the January 28, 2010, hearing, as required by Rule 9-208(g).

The court convened a hearing on November 18, 2010. Appellee was present and represented by counsel, but appellant failed to appear. The court granted appellee's motion to dismiss appellant's exceptions, ordered appellant to pay $137.00 to appellee for attorney's fees and expenses, and held the matter of appellee's exceptions *sub curia*.

On November 30, 2010, appellant filed a motion to reconsider, which the court denied in an order dated January 6, 2011. The court's order also sustained appellee's exceptions in part, providing that appellant's exercise of limited legal custody must "not adversely affect the child's school work or attendance or require the child to travel to locations more than thirty (30) minutes travel time from the child's residence in Manchester[,]" and that when the appellant exercises his newly-granted overnight visitation, he must "return the minor child 'on time' to school on Tuesday mornings, or if there is no school, the child shall be returned to [appellee's] place of employment by 10 A.M."

Appellant timely filed notice of appeal and presents the following questions for our review:

> I. Did the Court err in denying the appellant shared physical and legal custody as well as the right to claim the parties' minor child every other year on tax returns based on the order dated May 28, 2009?
>
> II. Did [the] Court err in granting the Appellee's Exceptions and legal fees in the amount of $137.00?
>
> III. Did [the] Court err in dismissing Appell[ant]'s Exceptions and hearing the Appellee's [exceptions]?

For the reasons that follow, we answer no to all questions and affirm the judgment of the circuit court.

DISCUSSION

Appellant first argues that the trial court erred in denying him shared physical and legal custody as well as the right to claim the parties' minor child every other year on tax returns. In reviewing a custody decision, we do not overturn factual findings unless they are clearly erroneous, and we do not disturb decisions founded on those facts unless the court has abused its discretion. *Maness v. Sawyer*, 180 Md. App. 295, 311-12 (2008). See also *Boswell v. Boswell*, 352 Md. 204, 223 (1998) ("Custody and visitation determinations are within the sound discretion of the trial court, as it can best evaluate the facts of the case and assess the credibility of witnesses." (citing *Beckman v. Boggs*, 337 Md. 688, 703 (1995))).

Appellant cites no authority or record evidence in support of his claim of error, and he merely recites the existing custody arrangement before adding:

> [The] testimony of both parties supports the fact that the Appellant is actively involved in the life of the parties' minor child outside sports and the Court order. Further appellant provides finances for all sports and contributes to the living expenses of the parties' minor child in addition to the court ordered child support.

This argument does not describe any material change in circumstance justifying a custody modification, *see Wagner v. Wagner*, 109 Md. App. 1, 28-29 (1996), nor does it explain why the court's findings were clearly erroneous or its decision was an abuse of discretion. We therefore will not overturn the court's judgment on this point.

Second, appellant argues that the court erred when it granted appellee's exceptions. Specifically, appellant argues that the court modified custody by "limiting Appellant's decision making powers to where the minor child could play sport and the time the minor child is required to return on Tuesday" from visitation with appellant, and that the court erred when it did so without a finding of material change or analysis of the child's best interests. But this argument mistakes the entire course of the court's actions, which merely granted modifications to which the parties agreed and that favored appellant (*i.e.* limited legal custody and increased visitation). When the court granted appellee's exceptions it merely clarified the master's recommendations. To the extent that these "limitations" were not in appellant's favor, they effectively denied his requests for modification beyond what was agreed to, and we decline to overturn that decision for the reasons set forth, above.

Third, appellant argues that the court erred when it awarded appellee attorney's fees because, as he posits, "Maryland follows the common law ***'American Rule,'*** [a] rule in law and economics that says attorney fees should be paid by each party involved in litigation - even the party that wins the case." (Emphasis in original.) Although this is generally true, "[f]ee shifting, an exception to the American rule, whereby a court orders payment of the prevailing party's attorneys' fees by the losing side, may be accomplished by an express agreement or by statute." *Henriquez v. Henriquez*, 413 Md. 287, 294 (2010). Specifically, Maryland Code (1984, 2006 Repl. Vol.), § 12-103(a)(1) of the Family Law Article, authorizes the court to "award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person . . . applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties[.]" *See also Henriquez*, 413 Md. 287. Because appellant's only argument is his incorrect contention that Maryland makes no exceptions to the "American rule," he has failed to demonstrate any error in the court's attorney's fee award.

Fourth, appellant argues that the trial court erred when it denied his motion to reconsider on the grounds that he should have been granted the opportunity to appear before the court at a hearing. "[A] trial court's decision to grant or deny a motion to postpone or continue a trial is within the sound discretion of the trial court, and, accordingly, the decision is subject to a great degree of deference on appellate review." *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.,* 418 Md. 231, 267 (2011) (Harrell, J., concurring); *Schroder v. State*, 206 Md. 261, 265 (1955). Appellant proffered in his motion to reconsider that "[a]t the time of the postponement the plaintiff informed both counsel for the defendant and the assignment clerk that November 18, 2010 was not a good date for the plaintiff due to family issues[,]" and proffers in his appellate brief that he "was scheduled to be out of town" at that time. But not only has appellant failed to provide any further explanation or details, he had nearly five months after being notified of the rescheduled date in which he could have either moved for another postponement or rearranged his travel plans. Finally, appellant relies on a mistaken interpretation of Rule 9-208(i)(2), which provides that "[a] hearing on exceptions, if timely requested, shall be held within 60 days after the filing of the exceptions unless the parties otherwise agree in writing." Appellant interprets this to mean that the parties must agree in writing to *any* hearing more than sixty days from the exceptions' filing, but the rule does not specify when a hearing must actually be held, should the parties "otherwise agree," nor does it specify that the written agreement provide for a given hearing date. Thus, Rule 9- 208(i)(2), cannot be interpreted as appellant contends.

For the foregoing reasons, appellant has demonstrated no error in the circuit court's decisions, and we therefore affirm the challenged judgments.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Cite as 2 MFLM Supp. 39 (2012)

Child support: destitute adult child: SSI benefits

Samuel W. Wilmore
v.
Rosalyn E. Wilmore n/k/a Rosalyn E. Bradford

No. 384, September Term, 2010

Argued Before: Wright, Kehoe, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Salmon, J.

Filed: January 5, 2012. Unreported.

Since there was no dispute that the parties' 27-year-old son cannot, as a result of autism and severe mental retardation, be self-supporting, he meets the statutory definition of a destitute adult child; furthermore, his SSI benefits do not offset his parents' child support obligations.

Samuel W. Wilmore, appeals a portion of the judgment of absolute divorce and the subsequent denial of his motion to alter or amend the judgment of absolute divorce, entered by the Circuit Court for Baltimore County. He presents two questions for our consideration:

> (1) Did the court commit error when it calculated a child support obligation for the appellant on the basis of the shortfall of the income of the child (Charles) without regard to the child support guidelines in Family Law Art., § 12-101 *et. seq.*?
>
> (2) Did the court commit error when it failed to include the Appellee's Individual Retirement Account (IRA) in its division of marital property?

For the reasons that follow, we shall vacate, in part, the judgment of absolute divorce and remand this matter to the circuit court with instructions to make further findings in accordance with the views expressed in this opinion.

I.

Samuel W. Wilmore and appellee/plaintiff below, Rosalyn E. Wilmore (n/k/a Rosalyn E. Bradford), were married on May 30, 1987. One child was born to the couple, Charles who was 27 at the time of trial. Charles suffers from severe autism and mental retardation and functions at the level of a toddler.

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The Wilmores separated in November 2005 and thereafter lived separate and apart, without cohabitation and without the expectation of reconciliation, from that time. Mrs. Wilmore filed for divorce in July, 2009. Following a contested trial on the merits, the circuit court made an oral ruling on December 22, 2009, in which the court said it would grant Mrs. Wilmore an absolute divorce from Mr. Wilmore. The court ordered Mr. Wilmore to pay $133.32 per month for the care and support of Charles, along with a $4,666.20 child support arrearage to be paid at the rate of $25.00 per month. The court further determined that Mrs. Wilmore was entitled, as an alternate payee, to 50% of the marital property portion (stipulated by the parties to be 56%) of Mr. Wilmore's monthly pension benefits under the plan established by appellant's former employer, payable "if, as, and when" appellant becomes eligible to receive the benefits. The court denied Ms. Wilmore's claim against Mr. Wilmore for dissipation of $14,000 in marital assets. The court also denied Mr. Wilmore's counter-claim for alimony.

On January 7, 2010, Mr. Wilmore filed a motion to alter or amend the judgment, alleging that: (1) the circuit court, in failing to employ the child support guidelines set forth in Md. Code (2006 Repl. Vol.),§12-204 of the Family Law Article ("FL"), incorrectly calculated his past and future child support obligations, and; (2) the circuit court erred in failing to award him a 50% share of Mrs. Wilmore's IRA, because that IRA comprised marital property. The written judgment of absolute divorce, which incorporated the court's oral ruling, was filed on January 27, 2010.

The circuit court, on April 6, 2010, denied Mr. Wilmore's motion to alter or amend the order of absolute divorce. It is from the judgment of absolute divorce and the denial of appellant's motion to alter or amend the judgment of divorce that Mr. Wilmore appeals.[1]

Additional facts will be set forth as relevant to our determination of this matter.

II.

Mr. Wilmore alleges that the circuit court erred in (1) ordering him to pay child support without making the required reference to the child support guidelines; (2) including in its calculation of child support income an item that is expressly excluded under the guidelines, *i.e.*, his supplemental security income of $1,809 per month he receives as a result of a physical disability, and; (3) failing to take into consideration the supplemental security income Charles receives each month as a result of his disability. Under the child support guidelines, Mr. Wilmore argues, his actual income is $0 because, under FL §12-201(b)(5), "actual income" does not include supplemental security income, which is his only source of income. Therefore, he continues, he should have no obligation to pay child support.

Furthermore, based solely on Mrs. Wilmore's stated monthly income of $2,103.74, the couple's child support obligation would be $630 per month.[2] As Charles receives $927 per month in supplemental security income, Mr. Wilmore continues, that amount should be set-off against the parents' $630 basic child support obligation, which would also serve to negate Mr. Wilmore's child support obligation.

Although Mr. Wilmore argues in his brief that "nowhere in the record of this case was it ever suggested th[at] Charles Wilmore is 'destitute'," he does not dispute that Charles is severely retarded and unable to care for or support himself. Although the applicable statutes and case law refer to a "destitute adult child," that label is a term of art and does not mean that a disabled adult child must be penniless before an award of child support for the child's benefit is allowable. *Corby v. McCarthy*, 154 Md. App. 446, 486-87 (2003).

FL §13-101(b) states that a "destitute adult child" is defined as "an adult child who: (1) has no means of subsistence; and (2) cannot be self-supporting, due to mental or physical infirmity." Under this definition, a mentally or physically infirm child who has some form of income may still be a destitute adult child if he or she cannot be self-supporting. Because there was no dispute between the parties that Charles cannot, as a result of his autism and severe mental retardation, be self-supporting, he meets the definition of a destitute adult child, and the circuit court correctly so found.

A parent of a destitute child who has sufficient means has a statutory duty to provide that child with food, shelter, care, and clothing if the child has insufficient resources or insufficient income earning capacity to enable him [or her] to meet his reasonable expenses. *Goshorn v. Goshorn*, 154 Md. App. 194, 217 (2003).

Generally, in setting child support obligations between a minor child's parents, the trial court is required to utilize the child support guidelines.[3] *Drummond v. State*, 350 Md. 502, 511-12 (1998). Because the General Assembly intended "'to place the failure to support a [destitute adult child] on equal footing with failure to support a minor child,' it follows that the procedure and remedies for the enforcement of that right must also be 'on equal footing.'" *Stern v. Stern*, 58 Md. App. 280, 295 (1984) (quoting *Smith v. Smith*, 227 Md. 355, 360 (1962)). As a result, we have held that the child support guidelines apply equally to a destitute adult child as to a minor child. *Goshorn*, 154 Md. App. at 219.

Although there is a presumption that the amount of child support resulting from the application of the guidelines is correct, that presumption is rebuttable. The trial court "may deviate from the guidelines if their application would be 'unjust or inappropriate.'" *Id*. *See also* FL §12-202(a)(2)(ii) ("The presumption may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate in a particular case."). If the court makes such a determination, however, it "shall make a written finding or specific finding on the record stating the reasons for departing from the guidelines." FL §12-202(a)(2)(v). That finding must state: the amount of child support that would have been required under the guidelines; how the order varies from the guidelines, and; how the finding serves the best interests of the child.

The trial court said in its oral opinion:

> THE COURT: . . . With respect to the child support issue, I do find that Charles is twenty-seven and as I mentioned he is autistic and suffers with mental retardation. Everyone agrees that Charles cannot be self-supporting. Everyone agrees that Mr. Wilmore has not contributed financially since January of 2007. Now, if I take a look, as I did, at Plaintiff's exhibit four, which is essentially Charles Wilmore's financial statement as prepared by his mother and counsel, I actually went through the exhibit and I find that $100.00 bill, water bill, attributed to Charles alone is unreasonable. In Mrs. Wilmore, now Ms. Bradford's, exhibit five, she attributes no amount of water to her own use and that's not acceptable. So I will tell you that I thought a reasonable number for the water bill was $50.00 for Charles and then I attributed the remaining $50.00 to Ms. Wilmore. I also thought that and find as a fact that the replacement furnishing appliances category which

you'll find on page two of nine where Ms. Wilmore attributed $50.00, I thought that was unreasonable. I did hear testimony that Charles bounces on the bed and I can't for the life of me understand why one can't just close the door and keep him out of there but there's, there's no reason for $600.00 to be attributed to essentially destruction. I made that $25.00 because I do think that things wear out. Page three of nine, $300.00 was attributed to . . . Charles . . . for food. Again, this doesn't make a whole lot of sense to me because in exhibit five, Mrs. Wilmore attributed $50.00 to Charles for food and $750.00 for herself. I think that a reasonable amount of allowance for food for someone, a male at the age of twenty-seven, is probably $200.00 a month and so that's what I put there. While I am glad to see that Charles is apparently involved in some extra-curricular activities which you'll find at the bottom of page three of nine, I also noted that under recreation and entertainment, there is, there are funds allotted for dining out, for videos and theater and for allowance and the total was, was $130.00 a month. That seemed like quite a bit to me. I deducted $25.00 from the extracurricular activities and so that remained at, remained at $25.00. On page four of nine you should know that Ms. Wilmore attributed $500.00 a month to day care. Her testimony in Court, however, was the cost was between $50.00 and $100.00, so giving her the benefit of the doubt, I made it $75.00 a week which would be $300.00, not the $500.00 she put down. And so, I find as a fact that the reasonable expenses that . . . Charles . . . incurs are in the neighborhood of $1,330.00 a month. Excuse me a second. That leaves, with those deductions it leaves . . . Charles . . . with a shortfall, if you take into account the money that he receives because of his disability of $303.00 a month, I took that number and multiplied it by Mr. Wilmore's proportionate share and I come up with $133.32 per month that Mr. Wilmore should be paying in child support. Now obviously that's a significant departure from the guidelines but I think I've adequately expressed just how I got there.

The court did not, as required by FL §12-202(a)(2)(v), state the amount of child support that would have been required under the guidelines, how its order varies from the guidelines, or how the deviation from the guidelines serves Charles's best interests. Therefore, we will remand the matter to the circuit court to make those findings on the record.

Upon remand, the court must make a determination as to the nature of the monthly benefit Mr. Wilmore receives from the government for his disability. He avers that the amount comprises "supplemental security income," which would not be considered as "actual income" under FL §12-201(b)(5) and, thus, not considered in allocating the child support obligation between the parents. ("'Actual income' does not include benefits received from means-tested public assistance programs, including temporary cash assistance, Supplemental Security Income, food stamps, and transitional emergency, medical, and housing assistance."). On the other hand, however, FL 12-201(b)(3) specifies that "Social Security benefits" are included as actual income.

Mr. Wilmore alleges that the money he receives each month is supplemental security income that should not be considered as actual income in determining his child support obligation. But at trial he introduced a 2008 Form SSA-1099 detailing the amount of the disability payments he received. That form is titled "Social Security Benefit Statement." It is not clear from that form that all the amounts paid were for appellant's disability. On remand, the circuit court should take additional testimony and make a factual finding as to whether Mr. Wilmore's monthly "income" comprises "supplemental security income," which would not be considered actual income for the purposes of allocating child support, or "Social Security benefits," which would be considered actual income, and then re-determine the parties' respective child support obligations accordingly.

Finally, in response to Mr. Wilmore's contention that the court should have set off the parents' $630 child support obligation against the $927 in Social Security disability benefits Charles receives each month, this Court has made clear that Social Security benefits received directly by a child "are by no means an automatic credit or necessarily a dollar for dollar set off against a child support obligation." *Goshorn*, 154 Md. App. at 220. In *Goshorn*, this Court said:

> [T]he policy behind this rule is that "[relieving] a parent of his or her obligation because the child receives a

> benefit to which he or she is entitled from some other source would not ordinarily be consistent with [the parent's duty to provide for the maintenance of their children.]" Furthermore, "this approach puts a child of separated parents in the same situation as a child of parents [who are not separated] because it allows the child to maintain the same standard of living as if the parents had not separated." The same reasoning would apply to a "destitute adult child."

Id. (quoting *Ley v. Forman*, 144 Md. App. 658, 671-72 (2002)) (Internal citations omitted).

It is Charles, not his parents, who is entitled to his Social Security disability benefits, regardless of whether his parents are together or apart. It would create an inequitable outcome to give a child of separated parents the benefit of only his parents' income when a child in the same circumstances, but whose parents remain together, would receive both his own disability benefits and the parents' support. *Ley*, 144 Md. App. at 671. For these reasons, the income a child receives from a source other than his parents is thus initially not a normal part of the calculation of the basic child support obligation by the parents under the child support guidelines. *Drummond v. State*, 350 Md. 502, 513 (1998).

The trial court correctly took into consideration Charles's income when it elected to depart from the child support guidelines. *Id.* The trial court has the discretion to deviate from the child support guidelines if, after considering any income received by the child, their application would be unjust or inappropriate. *Id.* at 518. In doing so, we again point out, however, that the trial court is required to make, on the record, the factual findings mandated by FL §12-202(a)(2)(v).

II.

Next, Mr. Wilmore asserts that the trial court erred in failing to award him his marital share of Mrs. Wilmore's Individual Retirement Account ("IRA"). We do not completely agree to that assertion. We point out, however, that the court had at least an obligation to consider Mrs. Wilmore's IRA in its award to the parties, but it failed to do so.

On neither the Joint Statement of Parties Concerning Marital and Non-Marital Property, nor her Long Form Financial Statement, did Mrs. Wilmore disclose to the court the existence of an IRA in her name. Upon questioning by Mr. Wilmore's attorney at trial, however, Mrs. Wilmore acknowledged the following:

BY [Mr. Wilmore's attorney]:

Q. Mrs. Wilmore, I want to show you Plaintiff's answers to Defendant's interrogatories. That's the heading of the document. See if you recognize this and whether that is your signature?

A. Yes, that's my signature.

Q. Are those copies of your answers[?]

* * *

A. Yes.

Q. Okay. I'd like to refer you to question 16, which asks you to describe in detail any deferred compensation plan that you have?

A. You mean —

Q. Do you recall that question?

A. What did you mean deferred compensation plan?

Q. What is your answer to that question?

[Mrs. Wilmore's attorney]: Counsel, this is in regard to the IRA?

[Mr. Wilmore's attorney]: Yes.

[Mrs. Wilmore's attorney]: Financial IRA. You just want to ask her about the IRA?

[Mr. Wilmore's attorney]: Yes, I just —

A. Okay.

Q. That is your answer, you have $3,000 in IRA [sic], is that right?

A. At this point it should be $4,029.

Q. $4,029?

A. Yes.

Q. And these were done in August of this year?

A. Right. Last one I checked because of the stock market, up and down.

Q. Yes.

A. So it did go up to four.

Q. $4,029?

A. I do believe, I do believe last time.

Q. Is this deducted from your paycheck or do you —

A. My company pays.

* * *

Q. And attached to your answers to interrogatories was your financial

statement, which is also in evidence today, and this IRA is not listed there as an asset, is that right?

A. No, it is not.

Q. And this IRA is in your name alone?

A. Yes.

Thereafter, in announcing its oral ruling, however, the court stated only:

> THE COURT: . . . So I think to wrap up, folks, I am going to award Ms. Wilmore a divorce. She can resume her maiden name, she is to receive twenty-eight percent of the Bayer pension if, as and when that is drawn upon, child support to the tune of $133.32, arrears of $4,666.20, no alimony because Mr. Wilmore failed to meet his burden and no monetary award with respect to the $14,000 from disability.

Likewise, in its written judgment of divorce, the trial court omitted any mention of Mrs. Wilmore's IRA, which she does not dispute was an asset acquired during the parties' marriage.

FL §8-203(a) requires that "if there is a dispute as to whether certain property is marital property, the court shall determine which property is marital property." Section 8-204(a) then requires the court to determine the value of all marital property, and §8-205 requires that after the court complies with §§8-203 and 204 by determining what property is marital and the value of the marital property, the court should consider and evaluate the factors set forth in §8-205[4] in granting a monetary award and/or transferring ownership of an interest in certain property, including a retirement plan. It is mandatory for a trial court to carry out the provisions of §§8-203, 204 and 205. *Jandorf v. Jandorf*, 100 Md. App. 429, 438 (1994).

When the right to receive retirement benefits is accrued during the marriage, it is marital property subject to equitable distribution. *Long v. Long*, 129 Md. App. 554, 573 (2000). Indeed, as we noted in *Imagnu v. Wodajo*, 85 Md. App. 208, 212 (1990), there is "no dispute as to whether pensions or retirement benefits that accrue during a marriage constitute marital property" under FL §8-201(e).

In this matter, the trial court, after hearing testimony from Mrs. Wilmore regarding her interest in an IRA accrued during the parties' marriage, failed to include said interest in its summary of the couple's marital assets, to valuate the fund, or to allocate the expected benefits to the parties. Whether that failure was by design or an oversight on the part of the circuit court cannot be discerned from the record before us. Therefore, we remand the matter to the circuit court for further proceedings, and, on remand, we instruct the court to specify whether Mr. Wilmore is entitled to a portion of Mrs. Wilmore's IRA benefits, and, if so, the amount and manner in which the benefit shall accrue to him.

JUDGMENT VACATED WITH RESPECT TO THE MONETARY AWARD AND THE AWARD OF CHILD SUPPORT BUT OTHERWISE AFFIRMED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THE VIEWS EXPRESSED IN THIS OPINION; COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. Mr. Wilmore filed his motion to alter or amend the judgment of absolute divorce after the circuit court's December 22, 2009 oral ruling on the issues, but well before the circuit court filed its written judgment of absolute divorce on January 27, 2010. Md. Rule 2-534 states that "a motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket." Therefore, Mr. Wilmore's motion to alter or amend is treated as if filed on January 27, 2010, and treated as if it had been filed within ten days after the entry of judgment, and as a result it stayed the time for filing an appeal until the circuit court ruled on his motion. *Sieck v. Sieck*, 66 Md. App. 37, 41 (1986).

2. It is not clear how Mr. Wilmore arrived at this figure. Were we to discount Mr. Wilmore's income and accept that Mrs. Wilmore's income was $2,103.74, under the 2009 version of FL §12-204(e), the couple's total monthly child support obligation would have been $338. Furthermore, Mrs. Wilmore's financial statement actually reported her monthly income as $1,474.98. The trial court made no specific finding as to the parties' actual incomes.

3. In calculating a child support award, a court must first determine the adjusted actual income of each parent, as defined in FL §12-201(b). It then adds the income of each parent to arrive at their combined actual income, pursuant to FL §12-201(f). The basic child support award is determined by use of the schedule of basic child support obligations contained in FL §12-204(e), and that amount is divided between the parents in proportion to their adjusted actual incomes. FL §12-204(a).

4. The factors include: (1) the contributions, monetary and non-monetary, of each party to the well-being of the family; (2) the value of all property interests of each party; (3) the economic circumstances of each party at the time the award is to be made; (4) the circumstances that contributed to the estrangement of the parties; (5) the duration of the marriage; (6) the age of each party; (7) the physical and mental condition of each party; (8) how and when specific marital property

was acquired, including the effort expended by each party in accumulating the martial property; (9) the contribution of either party of property to the acquisition of real property held by the parties as tenants by the entirety; (10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home, and; (11) any other factor the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of interest in property, or both.

Cite as 2 MFLM Supp. 45 (2012)

Separation agreement: retirement benefits: ineligibility

Francis Peter Gilliam

v.

Margaret Virginia Janusz

No. 02361, September Term, 2009 and

No. 00118, September Term, 2010

Argued Before: Woodward, Kehoe, Sharer, J. Frederick (Ret'd, Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: January 5, 2012. Unreported.

The circuit court's determination that a COAP was a valid amendment to the separation agreement precludes a claim for unjust enrichment and attorneys' fees, since there was no breach of the agreement; however, the court did not err in declining to remove the *lis pendens* from appellant's property.

After experiencing marital difficulties, Francis Peter Gilliam, a retired federal government employee, and Margaret Virginia Janusz, his spouse, signed a marital separation agreement (the "Agreement") which provided that Gilliam would continue to fund a survivor's annuity for Janusz's benefit through the Civil Service Retirement System. The parties were divorced shortly thereafter in an action filed in the Circuit Court for Montgomery County. The circuit court then entered a "Court Order Acceptable for Processing" ("COAP"), an act required by the Office of Personal Management (the "OPM") in order for Janusz to retain retirement benefits after Gilliam's death. Unfortunately for the parties, the OPM eventually ruled that Janusz was not eligible to receive a survivor's annuity. Thereafter, Janusz filed an action in the circuit court seeking either rescission of the Agreement or recovery against Gilliam based upon an unjust enrichment theory. The circuit court entered judgment on Gilliam's behalf and Janusz appealed.

In *Janusz v. Gilliam*, 404 Md. 524, 541 (2010) (*Janusz I*), the Court of Appeals remanded the case, without affirmance or reversal, to the circuit court for that court to decide whether the Agreement had been validly modified by the COAP. The circuit court found that the COAP was a valid amendment to the Agreement. In the current appeal, Gilliam challenges certain orders entered by the circuit court in the remand proceedings.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

FACTUAL AND PROCEDURAL BACKGROUND

We start with the facts as set forth by Judge Greene in *Janusz I*, which we have supplemented as necessary.

> Margaret Virginia Janusz, . . .,[1] and Francis Peter Gilliam . . ., were married on August 5, 1996. The parties entered into a Voluntary Separation and Property Settlement Agreement on February 14, 2000. On March 1, 2000, the court entered a Judgment of Absolute Divorce, and the Agreement was incorporated, but not merged, into the Judgment. The Agreement provided, in relevant part:
>
> > 3. Rehabilitative Alimony. The Plaintiff [Gilliam] agrees to pay the Defendant [Janusz] rehabilitative alimony . . . for thirty-six (36) months effective March 1, 2000. . . . Additionally, Plaintiff [Gilliam] agrees to continue funding and maintain in effect his survivor's annuity through the [federal] Civil Service Retirement System at a cost to him of approximately $ 4,320.00 per year, with monthly benefits available to the Defendant [Janusz] after his death, in the amount of $1,500.00 plus cost of living increases. If the Plaintiff [Gilliam] should die before the end of the thirty-six (36) month period of rehabilitative alimony, such said alimony will cease and survivor's annuity will be effective. This agreement as to alimony is non-modifiable.[1]
> >
> > * * *
> >
> > 5. General Mutual Waiver of Claims. The parties hereby

specifically agree that their intention is to conclude by this Agreement all claims and disputes between them; accordingly, apart from the agreements and promises specifically set forth in this Agreement, the parties hereby mutually and irrevocably waive and abandon all manner of claim against each other and their estates, regardless of the legal, factual, or equitable basis for any such possible claim. . . .

* * *

12. Modification of Agreement. The parties hereby agree that there shall be no modifications of this Agreement except in writing and executed with the same formality of this Agreement. No other oral representations or agreements, or oral or written agreements not specifically incorporated by reference in this Agreement, whether made before or after the execution of this Agreement, shall be of any force and effect.

A COAP,[ ] incident to the couple's divorce, was executed on April 13, 2000, by both parties' attorneys in the divorce proceeding [ ] and signed also by [then] Domestic Relations Master Ann Sundt, and then Circuit Court Judge Patrick Woodward. The COAP provided in relevant part:

4. The defendant [Janusz] is entitled to a survivor annuity based on the plaintiff's [Gilliam's] monthly retirement benefits. The amount of her survivor annuity has been elected by the plaintiff [Gilliam] and, at the time of divorce, has an approximate value of $1,500.00 per month. It is the intention of the parties to maintain the plaintiff's [Gilliam's] election.

* * *

7. If any provision of this Order designated for implementation by the Office of Personnel Management is found by that agency to be unacceptable for processing, the parties shall renegotiate their Agreement, if necessary, and draft a revised Order which will accord with both their intent and the agency's requirements insofar as that is possible. The parties shall request the Court to enter a Modified Order acceptable for Processing, substituting their renegotiated provisions in the Order nunc pro tunc.

8. If it is not possible to draft a Court Order Acceptable for Processing which both accords with the parties' original intent and meets the agency's requirements, the parties shall adjust their Separation Agreement to assure that each party benefits in a manner equivalent to the provisions originally negotiated.

9. The Court retains jurisdiction to enforce the above provisions with respect to such modifications of this Order as are necessary under the above paragraphs to assure that the Order is Acceptable for Processing in accordance with applicable law.

Several years after the divorce became final, the federal Office of Personnel Management ("OPM") informed appellant that she was not eligible for appellee's survivor benefits pursuant to federal law.[Opinion ftn. 7]

Appellant appealed this administrative decision to the federal Merit Systems Protection Board, and Chief Administrative Judge William L. Boulden affirmed OPM's decision.

On January 25, 2006, appellant filed, in the Circuit Court for Montgomery County, a complaint which contained three claims: Count I - Rescission, Count II - Unjust Enrichment, and Count III - Attorney's Fees. On November 1, 2006, appellee filed a Motion for Summary Judgment, arguing that he had complied with the contract, and that there was no basis, in law or equity, for appellant's claim. On December 14, 2006, appellant filed an opposition to appellee's Motion for Summary Judgment. The

> trial court denied appellee's Motion for Summary Judgment on January 8, 2007.
>
> After a trial, in April 2007, the Circuit Court determined that the mistake regarding appellant's eligibility for the survivor's annuity was a mistake of law, rather than a mistake of fact, as appellant had argued. In its ruling, the trial court noted that a mistake of law could not be the basis for rescinding the contract. Regarding the unjust enrichment, quasi-contract claim, the court determined that, although appellee may have been unjustly enriched, appellant had waived her right to this equitable claim in paragraph five of the Agreement. That paragraph states, in relevant part: "the parties hereby mutually and irrevocably waive and abandon all manner of claim against each other and their estates, regardless of the legal, factual, or equitable basis for any such possible claim." Finally, the trial court denied appellant's request for attorney's fees.
>
> Appellant filed a notice of appeal to the Court of Special Appeals. [ ] [1] Before any proceedings in the intermediate appellate court, we granted certiorari. *Janusz v. Gilliam*, 402 Md. 352, 936 A.2d 850 (2007).

404 Md. 530-34 (some footnotes omitted).

Judge Greene framed the issues before the Court as:

> whether a mutual mistake of law by the parties to a contract, the assumed future entitlement, post-divorce, of Ms. Janusz to Mr. Gilliam's survivor's annuity benefits, is grounds for rescinding their contract, or in the alternative, whether Mr. Gilliam has been unjustly enriched.

Id. at 529.

The Court first concluded that the survivor's annuity was marital property and subject to division under the Agreement. *Id.* at 535. The Court then considered Janusz's contention that the Agreement was subject to rescission because the parties executed it under a mutual mistake of law, namely, both parties believed that Janusz would be eligible to receive a survivor's annuity. The Court held that "the mutual mistake of law made by the parties is not, as a matter of law, grounds for rescission." *Id.* at 537. The Court then turned to the issue most relevant to the appeal before us, namely, whether Janusz had a claim for unjust enrichment. Judge Greene stated:

> In Maryland, a claim of unjust enrichment, which is a quasi-contract claim, may not be brought where the subject matter of the claim is covered by an express contract between the parties. Although we rarely depart from this long-standing rule, we have recognized exceptions, when there is evidence of fraud or bad faith, there has been a breach of contract or a mutual rescission of the contract, when rescission is warranted, or when the express contract does not fully address a subject matter.
>
> The trial court ruled that this last exception, where the express contract does not fully address the subject matter, applied. The court noted that "this rehabilitative paragraph number three, when it talks about the survivor annuity, doesn't really fully address what's going to happen if [appellant is ineligible for the survivor's annuity]."
>
> * * *
>
> The COAP provides for the very situation that arose in this case, specifically, what is required of the parties if the Office of Personnel Management should find that the order is "unacceptable for processing," a term of art that encompasses what the OPM decided here. In that case, according to the provisions of the COAP, the parties are to renegotiate. *If on remand, the trial court determines that the COAP is an effective modification of the Agreement, then as a matter of law, the contract provides for the possibility that OPM may deny appellant's claim. Because the contract, (if it is found by the trial court to have been modified by the COAP, fully addresses the issue of the survivor's annuity, as a matter of law, then, appellant cannot recover under the theory of unjust enrichment.* If, however, the trial court determines that the COAP is not an effective modification, the court shall determine whether appellant is entitled to appropriate relief on her unjust enrichment claim.

Id. at 537-38. (Emphasis added; some internal quotation marks and citations removed.)

The Court then explored the conceptual similarities between a COAP and a qualified domestic relations order ("QDRO"). Viewing the two classes of orders as "analogous," the Court noted that QDRO's "can be 'either collateral to a judgment as an avenue for enforcement or it can be an integral part of the judgment itself.'" *Id.* at 538 (quoting *Potts v. Potts*, 142 Md. App. 448, 459 (2002)).[2] The Court then remanded the case to the circuit court pursuant to Rule 8-604(d)(1), for it to determine whether "the COAP is an effective modification of the Agreement pursuant to the requirements for modification set forth in the original Agreement. . . ." *Id.* at 539. If the circuit court found this to be the case, then "the COAP constitutes an integral part of the judgment itself, and not merely an avenue for enforcement." *Id.*[3] The Court summarized its pertinent holdings:

> We hold that a mutual mistake of law is not grounds for rescission of an otherwise valid contract, nor is it the basis for a claim of unjust enrichment. Furthermore, appellant's claim of unjust enrichment cannot succeed if the Agreement fully addresses the subject matter. Therefore, on remand, the trial court should determine whether the COAP was a valid modification to the Agreement, in which case the Agreement would fully address the situation at hand. Finally, we hold that, as a matter of law, the appellant did not waive her right to modify or to enforce the Agreement.

Id. at 540-41.

The Court's mandate was as follows:

> **JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS NEITHER AFFIRMED NOR REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS AS LIMITED BY THIS OPINION. APPELLEE TO PAY THE COSTS.**

Id.

Upon remand, the circuit court held a non-evidentiary hearing on September 17, 2008, to determine whether the COAP was a valid and effective modification of the Agreement. At the conclusion of the hearing, the court explained its role in light of the Court of Appeals' mandate:

> the Court of Appeals basically says, in this case, . . . the court below has two choices. And essentially, if the court determines that the COAP is an effective amendment to this, then the COAP sets out what it is the parties are supposed to do, and we all know, now, that what the parties are supposed to do is renegotiate. But if the court finds that the COAP is not a valid or binding agreement of the parties, then it looks to see whether there is a gap and there is unjust enrichment.

On October 6, 2008, the circuit court entered an opinion and order. After reviewing the mandate set forth by the Court of Appeals, the circuit court found that the COAP was an effective amendment to the parties' Agreement that "provided additional and alternative means by which the parties could carry out the original intent of their Agreement." The circuit court "determine[d] that Plaintiff's remedy is to follow the agreed-upon alternative remedies set forth in the COAP, and, at this time, the Plaintiff is not entitled to appropriate relief on her unjust enrichment claim." The circuit court further ordered that:

> The parties shall adjust their Separation Agreement to assure that each party benefits in a manner equivalent to the provisions originally negotiated.
>
> David S. De Jong, Esquire . . . be and hereby is appointed as an expert . . . to work with the parties to help them effectuate the original intent of their Agreement, and the parties shall cooperate with Mr. De Jong, meeting with him as required, producing documents or information that he requires, in good faith, and they shall share his hourly cost equally.
>
> The Matter be set for a further hearing on December 19, 2008 . . . in order for the Court to hear from Mr. De Jong (unless a resolution has already been agreed to by the parties) as to his efforts to assist the parties, his recommendations, and the parties' response thereto.

Gilliam appealed from this order and Janusz filed a cross-appeal. *Gilliam v. Janusz*, No. 2019, September Term 2008. On December 11, 2008, Janusz filed a motion to dismiss Gilliam's appeal on the grounds that the circuit court's October 6, 2008 order was not an appealable final judgment. This Court denied Janusz's motion without prejudice to her right "to seek such relief in her brief." Subsequently, the parties agreed to dismiss the appeal without prejudice.

However, Gilliam failed to file his brief in a timely manner and this Court dismissed Appeal No. 2019, on its own motion, on July 16, 2009. Four days later, this Court received the parties' stipulation to the dismissal.

Returning to the proceedings before the circuit court, the circuit court held a series of hearings in December 2008, in which it heard from De Jong regarding the progress of the parties' negotiations. De Jong reported that, while the parties were working together in good faith to reach a settlement, such an agreement had not yet been attained. Specifically, De Jong testified that:

> the parties have been negotiating in good faith, with civility . . . the parties have been exploring several options. We've had two sessions and a lot of progress has been made. . . . I believe the parties, with my assistance, and with the excellent job their counsel have done in assisting, each of them are working diligently toward a solution. And I believe that there's a greater likelihood than not that . . . with an additional four to six weeks that a solution will be worked out. If not, I'm prepared to make a suggestion or, perhaps, alterative suggestions to the Court of ideas that would be within the authority of this Court.

Upon hearing De Jong's report and comments from the parties, the court set the matter in for February 2, 2009, "for a further one-hour status conference with the great hope, at least, that a settlement will be reached."

On January 26, 2009, Janusz filed a motion for summary judgment, requesting that the circuit court order the payment of her reasonable attorney's fees. The basis of the motion was paragraph thirteen of the Agreement, which stated:

> Default in the Performance of This Agreement. The parties hereto agree that in the event that either party hereto shall default in the performance of any of the covenants herein contained, and that as a result thereof it is necessary for the aggrieved party to initiate Court action to enforce said covenants, and if the said Court shall find a breach thereof to have occurred, then the defaulting party hereby agrees to pay all attorneys' fees and Court costs of the said proceedings.

In her motion, Janusz alleged that Gilliam breached the Agreement, and therefore owed her attorney's fees, because he defaulted in his performance of the clause in which "Plaintiff agrees to continue funding and maintain in effect his survivors annuity through the Civil Service Retirement System . . . , with monthly benefits available to the Defendant after his death, in the amount of $1,500.00 plus cost of living increases." Specifically, Janusz asserted that Gilliam breached the Agreement by obtaining an absolute divorce, which rendered his ability to maintain the survivors annuity impossible and therefore caused him to default on his obligation to maintain the annuity.

In his response, Gilliam asserted that the circuit court had previously denied a request by Janusz for an award of attorney's fees on April 3, 2007, in *Janusz I*, 404 Md. at 534, Janusz did not raise the issue of attorney's fees on appeal and, in any event, the Court of Appeals did not disturb the trial court's denial of attorney's fees. Gilliam stated that neither the Court of Appeals nor the circuit court had found that he had defaulted on the Agreement and that he did not default because he continued to fund the annuity in good faith until he was notified that Janusz was not eligible to receive the benefits under the annuity.

Before the circuit court ruled on Janusz's motion, it held a status conference on February 10, 2009, in order to hear from De Jong regarding the status of the parties' settlement efforts. The gist of the information presented at that hearing was that, while no settlement had been achieved, the parties continued to negotiate in good faith and with civility, and continued to consider both conventional and unconventional solutions.

The main obstacle in the negotiations was the fact that, according to De Jong's calculations, had the COAP been successful, Gilliam would only have had to pay an estimated $25,000, while Janusz would have received benefits of about $393,000. Another factor hindering settlement was that the parties had already "spent substantial amounts litigating which made concessions quite costly when combined with legal fees from an aggregate point of view."

De Jong also noted that an additional factor affecting negotiations was the fact that the language of the Agreement requires the parties to adjust the Agreement to assure that each party benefits in a manner equivalent to the provisions originally negotiated. According to De Jong, Gilliam cannot "benefit" if he pays more than $25,000 and Janusz cannot "benefit" if she receives less than $393,000. Finally, De Jong explained, the parties seemed to have different recollections regarding the negotiation of the COAP as to whether the transfer of real property was in exchange for the COAP or whether the COAP was one of a number of issues being negotiated.

After expanding upon these matters, De Jong presented a theoretical solution in which the court

would determine the value of the annuity, discounted to its present value. The court would then take the difference between the amount of money that Gilliam expected to pay and the amount of money Janusz expected to receive and would halve that number. The product of this calculation would represent the amount that would be awarded to Janusz. De Jong suggested that such a solution would result in a shared benefit and detriment to both parties for what was their shared error in their shared order.

After receiving the updates and advice of De Jong and meeting with counsel, the circuit court found that both parties entered into the COAP in good faith and had continued to negotiate in good faith. The circuit court set the matter in for a further status hearing with De Jong to allow the parties an additional opportunity to achieve settlement.

The court held a combined status hearing and hearing on Janusz's summary judgment motion on April 22, 2009. At the start of the hearing, the court noted that Janusz's motion was pending and informed the parties that it would take the motion under advisement. The court permitted the parties "five minutes" to make any oral additions to the motions that they felt were necessary. Gilliam took this opportunity to argue that "there is no action pending for the attorney fees and they're not reasonable and those that were already submitted to the Court have been denied." In response, Janusz pointed out that she included an affidavit attesting to the reasonableness of the attorney's fees. Janusz then explained that she did not appeal from the circuit court's denial of attorney's fees because the circuit court had denied all of her requested relief and therefore found that there had been no default of the Agreement. Janusz argued, however, that Gilliam did default because he obtained the absolute divorce and the divorce was the triggering event that made it impossible for him to perform in accordance with the COAP. The circuit court then took testimony from De Jong and other witnesses.

At the close of testimony and closing arguments, the circuit court made a number of clarifying comments before taking the matter under advisement. In these remarks she stated that:

> I do think that the language of the COAP, read together with the original separation agreement, is more than an agreement to agree. . . . [Gilliam's] obligation was to maintain that survivor annuity, but it certainly was never contemplated that he was going to be the payor of this survivor annuity. For one thing, he'd be dead. . . . His obligation was to continue the payment of the [$]4,320 and he did that until he learned that upon [Janusz's] last appeal, there was no other appeal. She wasn't going to get it. Then the parties' obligation is to adjust their separation agreement. . . . [The terms of the Agreement to] assure that each party, each party, benefits in a manner consistent to the provisions originally negotiated. He paid a certain amount. She gets a certain benefit. Not just that she benefits, each party benefits. . . .
>
> * * *
>
> [T]he Court really is attempting to do what the parties intended to do, all of it, not just half of it, not just what was intended from Ms. Janusz, but what was intended for both parties. So I'll do it, but I can tell you this. You're going to have at least 10 days to two weeks to sit in your own stew for a while. . . . So I'm urging you to conserve the assets and make a deal, or I will make it for you.

On July 10, 2009, the court presented its oral opinion to the parties. After setting forth the procedural and factual history of the case and her findings and conclusions, the court granted Janusz's motion for summary judgment for attorney's fees. As to its ability to order certain remedies, the court explained that:

> [t]he Court cannot rescind or reform the parties' agreement. Any modifications to their agreement will have to be done by them. They have a contract. The Court has no authority to rewrite it. But the parties do. The Court's only authority is to enforce the existing agreement, as with any contract, or make any amendments, modifications, agreed to by the parties.
>
> * * *
>
> I do not believe this Court can order Mr. Gilliam to purchase an annuity for Ms. Janusz's benefit. I do not believe this Court can enter a judgment for a future right or claim, specifically what Ms. Janusz may have been entitled to receive under the parties' agreement, over the next 15 or 20 years.
>
> Until the time of Mr. Gilliam's death, there is no asset to which Ms. Janusz may lay claim. Nothing has accrued. Nothing is owed.

In addressing the parties' compliance with the Agreement and COAP, and Janusz's claim for attor-

ney's fees, the court stated:

> Ms. Janusz claims, and this Court agrees, Mr. Gilliam has twice defaulted. The first time, albeit unintentionally, when he sought and was granted a judgment of absolute divorce, the effect of which caused her to lose any claim to his federal pension. . . . Unintentional, but it is the proximate cause of her losing her survivor annuity.
>
> But he breached again, and this time it was intentional. He breached his obligation under the agreement, quote, "to continue funding and maintain in effect his survivor's annuity through the Civil Service Retirement System," . . .
>
> The agreement makes no allowance for whether the breach is intentional or unintentional. His divorce was the proximate cause of her losing her entitlement. And although he explains there was no point in continuing to decrease his pension monthly in order to provide an annuity which Ms. Janusz could not receive, and therefore acknowledges he stopped funding the survivor annuity. . . . the agreement does not say that his obligation terminates if it seems futile or unreasonable.
>
> * * *
>
> The Court finds . . . *two* breaches occurred. The first that caused the loss of her benefits, and the second, as Mr. Gilliam concedes, which may have been understandable, reasonable. But he did stop funding, and he did receive the benefit of having his take-home pension increased.
>
> * * *
>
> The next question is, as a result, was it necessary for Ms. Janusz to initiate a court action. . . . This Court cannot speculate as to whether there was a reasonable alternative to Ms. Janusz's decision to file suit . . . But two and a half years later, there is still no resolution. And the simple logic is she cannot wait.

Finding that most of her legal fees were reasonable, the circuit court awarded Janusz $90,000 in attorney's fees. The circuit court then stayed the entry of the award for ten days to "give the parties time to ponder this Court's findings and conclusions. And in that period of time, the Court will entertain any agreed-upon modification of this order." As to the remaining issues, the circuit court informed the parties that Janusz's request to enforce the COAP and Agreement "so as to provide her with a benefit equivalent to her lost annuity, is denied without prejudice to any claims she may have following Mr. Gilliam's death."

On July 21, 2009, the circuit court entered a written order and judgment reiterating the findings of fact and law in its oral opinion. Specifically, the order stated:

> that Plaintiff's request that the Court enforce and modify the terms and provisions of the parties' Voluntary Separation and Property Settlement Agreement, including the Court Order Acceptable for Processing (COAP), in order to effectuate the parties' agreement with respect to the survivor annuity be and *it hereby is denied, without prejudice to any claim Plaintiff may have as a result of Defendant's death*; and it is further
>
> ORDERED that Plaintiff's request that the Court enforce paragraph 13 of the Voluntary Separation and Property Settlement Agreement be and it hereby is granted, and, the Court having determined that under the agreement Plaintiff is entitled to have her reasonable attorney's fees paid by Defendant,
>
> JUDGMENT is hereby entered for Plaintiff in the amount if Ninety Thousand Dollars ($90,000.00) against Defendant, and interest on any unpaid balance shall accrue at the legal interest rate beginning and accounting July 21, 2009.

(Emphasis added.) The parties subsequently filed various post-judgment pleadings, all of which were denied by the court. The only pleading directly pertinent to this appeal was Gilliam's motion to supplement the record with specific documents from prior proceedings in the circuit court, the Court of Special Appeals, and the Court of Appeals. We will discuss this motion in greater detail in Part I of this opinion.

On December 3, 2009, Gilliam filed an appeal, Appeal No. 2361, September Term 2009, "of the Orders entered in this case, including but not limited to" the orders and judgment entered July 21, 2009 and November 6, 2009. On January 4, 2010, while Appeal No. 2361 was pending, Gilliam filed a motion in the cir-

cuit court requesting the release of his property from the *lis pendens* effect of this action, and further seeking attorney's fees, costs and other appropriate relief. Janusz filed an opposition to Gilliam's motion, arguing that the circuit court should not remove the *lis pendens* and that Gilliam has no claim for attorney's fees and expenses, as his action has not concluded, as required by Rule 12-102(c)(2).

A hearing was held in the circuit court on March 9, 2010, regarding Gilliam's motion to terminate *lis pendens* and his request for attorney's fees, costs and other appropriate relief. After hearing arguments from Gilliam and Janusz on the *lis pendens* issue, the court found that based on what I've heard, I just don't think that I can find, at this point, that the issue of unjust enrichment is still not pending. And I think that, certainly, if that is still pending . . . any unjust enrichment due to the property, I think, would still be a viable claim, and, certainly, the lis pendens then, at this point, would still be needed.

The court further explained that "you're asking me to find good cause, and, at this point, based on the information that I have, I don't think I can find good cause." The court denied Gilliam's motion to terminate the *lis pendens*.

On March 22, 2010, Gilliam filed an appeal, Appeal No. 118, September Term 2010, of the circuit court's March 9, 2010 denial of his motion to terminate *lis pendens*, and his request for attorney's fees, costs and other appropriate relief.

On May 25, 2010, this Court granted the parties' joint motion to consolidate the two appeals.

Gilliam presents six issues,[4] which we have reworded, reordered, and consolidated as follows:

> I. Whether the circuit court should have granted judgment in favor of Gilliam with regards to Janusz's claim of unjust enrichment?
>
> II. Whether the circuit court erred in awarding Janusz attorney's fees based on a finding of Gilliam's breach of the COAP?
>
> III. Whether the circuit court erred in denying appellant's motion to release terminate the notice of *lis pendens* in this case?

We conclude that the circuit court's decision that the COAP was a valid amendment of the Agreement, coupled with the analysis and mandate of the Court of Appeals in *Janusz I*, required the circuit court to enter judgment in favor of Gilliam regarding Janusz's unjust enrichment claim. In addition, the circuit court erred in awarding Janusz attorney's fees because Gilliam did not breach the Agreement. However, the court did not abuse its discretion in denying Gilliam's motion to release real estate from the *lis pendens* effect of this action while it was still was pending.

Analysis

I. Janusz's Motion to Dismiss

Janusz has moved to dismiss "those portions of [Gilliam's] appeal . . . which are based upon: (A) The trial court's rulings on October 6, 2008; and (B) Improper inclusions in Appellant's Record Extract; . . ." Looking past issues of nomenclature — we cannot dismiss portions of appeals, *see* Rule 8-602 — we will treat Janusz's motion as a motion to strike portions of Gilliam's brief and the record extract. *See Corapcioglu v. Roosevelt,* 170 Md. App. 572, 590-591 (2006) ("It is well established in Maryland law that a court is to treat a paper filed by a party according to its substance, and not by its label.") We will deny the motion.

Janusz suggests Gilliam cannot raise any issue relating to the circuit court's October 6, 2008 decision, that is, the circuit court's decision that the COAP was a valid amendment to the Agreement, because Gilliam waived any issue that he could have raised in his previous appeal, Appeal No. 2019, which was dismissed for Gilliam's failure to submit a brief. We disagree for two reasons.

First, as we understand the arguments Gilliam presents on appeal, he does not challenge the circuit court's decision that the COAP is a valid amendment of the Agreement. Second, the October 6, 2008 order was neither a final judgment nor an appealable interlocutory order. The parties recognized this and filed a joint stipulation to dismiss Gilliam's appeal and Janusz's cross-appeal without prejudice. After the parties had executed the joint stipulation, but a few days before the stipulation itself was received by this Court, we dismissed the appeal because Gilliam failed to file his brief on a timely basis. Filing a brief in a case that the parties had agreed to dismiss would have been a pointless exercise. As a matter of courtesy, Gilliam should have notified our Clerk's Office that he was not going to file a brief in light of the parties' agreement to dismiss the appeal. However, under all of the circumstances, we see no reason why this Court's dismissal of the 2008 appeal should affect Gilliam's ability to raise properly reviewable issues now that a final judgment has been entered.

Janusz next suggests that this appeal should be dismissed because Gilliam included certain documents in the record extract before this Court despite the circuit court's denial of Gilliam's motion to supplement the record with those very documents.

Subject to exceptions not relevant in this case, the record before this Court includes "all original papers filed in the action in the lower court . . . ." Rule 8-413(a). Gilliam sought to introduce documents from the record of court proceedings that led to *Janusz I*. To the extent that there was a dispute as to the contents of the record, the issue should have been resolved in

the circuit court. *See* Rule 8-413(a). If the record, as transmitted by the clerk of the circuit court, was incomplete, Gilliam could have requested relief from this Court pursuant to Rule 8-414. While Gilliam's attempt at self-help is inappropriate, it does not warrant the sanction of dismissal. Instead, we will disregard any material in the extract that is not properly part of the record of this case, as that record was transmitted to us by the clerk of the circuit court.[5]

II. The Unjust Enrichment Claim

Gilliam asserts that the circuit court "improperly went beyond the scope" of the Court of Appeals' mandate in *Janusz I*. He asserts that the circuit court improperly exceeded the Court's mandate no less than thirteen times in the remand proceedings. These assertions of error can be divided into three broad categories. First, he argues that the circuit court erred in retaining jurisdiction over the case after it ruled that the COAP was a valid amendment to the Agreement and "[c]ompelling" the parties to negotiate with De Jong's assistance to resolve their dispute. Second, he asserts that the circuit court erred in "[q]ualifying [its] October 6th ruling [,that the COAP was a valid amendment to the Agreement,] by deciding [Janusz] was not 'entitled to appropriate relief on her unjust enrichment claim' 'at this time,' instead of making a final decision consistent" with the *Janusz I* mandate. Finally, he contends that the circuit court erred in a number of ways resulted in the court awarding Janusz attorney's fees. (We will discuss this last contention in Part III of this opinion.)

Before considering the parties' specific contentions, we will briefly review the pertinent aspects of the law of mandates, which is, in turn, an application of the doctrine of the law of the case to remand proceedings. As Judge Greene recently explained in *Kearney v. Berger*, 416 Md. 628, 641 (2010) (internal quotation marks and some citations omitted; bracketed material added by the *Kearney* Court):

> Maryland courts follow the law of the case doctrine. We have explained the doctrine many times, recently in *Reier v. Dept. of Assessments,* where we said:
>
> > Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record, as aforesaid, such a ruling becomes the law of the case and is binding on the litigants and [courts] alike, unless changed or modified after reargument, and neither the questions decided [nor] the ones that could have been raised and decided are available to be raised in a subsequent appeal. 397 Md. 2, 21, 915 A.2d 970, 981 (2007).

The mandate rule is an application of the law of the case doctrine to courts. *Tu v. State*, 336 Md. 406, 416-17 (1994) ("When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand." (quoting 1B J.W. Moore, J.D. Lucas & T.S. Currier, MOORE'S FEDERAL PRACTICE page 0.404[1], at 11-3. (2d ed. 1993) (emphasis in MOORED))). These principles are reflected in Md. Rule 8-604 (d)(1) (emphasis added):

> (d) **Remand**. (1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. *The order of remand and the opinion upon which the order is based are conclusive as to the points decided.* Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

Finally, "[w]hat remains within the power of decision of the [trial court] after remand depends . . . on the scope of the mandate." Tu, 336 Md. at 417 (quoting MOORE¶ 0.404[10], at 11-61).

The *Janusz I* Court remanded this case pursuant to Md. Rule 8-604(d)(1). In its opinion, the Court stated:

> [Janusz's] claim of unjust enrichment cannot succeed if the Agreement fully addresses the subject matter. Therefore, on remand, the trial court should determine whether the COAP was a valid modification to the Agreement, in which case the Agreement would fully address the sit-

uation at hand.

The Court's mandate specifically stated that the case was: "remanded to [the circuit] court for further proceedings as limited by this opinion."

We now turn to Gilliam's contentions, dealing first with his argument that the circuit court erred in requiring him to attempt to resolve his dispute with Janusz with the assistance of a court-appointed mediator. It is clear that the circuit court was acting within the scope of the Court of Appeals' mandate by determining that the COAP was a valid amendment to the Agreement. This being the case, as the Court of Appeals recognized in its opinion, the parties were contractually bound to renegotiate the terms of the Agreement. We perceive no error in the court's efforts to assist the parties in resolving their differences through court-ordered mediation. Moreover, Gilliam has not indicated how he was prejudiced by the court's efforts to help the parties settle this case, nor has he suggested what form of appellate relief is available to rectify what he claims was an error on the circuit court's part.

Gilliam's second contention is that the circuit court erred when, on July 21, 2009, it denied Janusz's request to "enforce and modify the terms" of the Agreement "*without prejudice* to any claims she may have following Mr. Gilliam's death." (Emphasis added). According to Gilliam, the only issue properly before the court was whether the COAP was a valid amendment of the Agreement, and that controversy was resolved by the circuit court's order of October 6, 2008. By resolving that issue, Gilliam asserts, the circuit court eliminated any current or future claims and therefore "decided and denied [Janusz's unjust enrichment claim] on October 6, 2008." Therefore, Gilliam contends, the only appropriate resolution was that which was provided through the Agreement, requiring that the parties renegotiate the Agreement. Accordingly, the circuit court should have dismissed Janusz's claim with prejudice.

Janusz counters that the circuit court correctly dismissed her claim for unjust enrichment as premature. She argues that the circuit court was within its discretion to dismiss her claim without prejudice so that she could bring the claim after Gilliam's death. Specifically, she suggests that the court appropriately anticipated that the resolution provided by the Agreement—that the parties adjust the terms of Agreement to achieve equivalent benefits — would fail, and an unjust enrichment claim might arise after Gilliam's death if no resolution had been reached. Janusz further maintains that, had the circuit court dismissed her claim with prejudice and Gilliam passed away before readjusting the terms of the Agreement, Janusz would have been left without a remedy. Janusz does not challenge the circuit court's ruling that the COAP was a valid amendment to the Agreement. However, she devotes a significant portion of her brief to her contention that her unjust enrichment claim is still viable, despite the circuit court's decision.

While we disagree with the analyses of both parties, we believe that the various orders of the circuit court fell short of completely fulfilling the Court of Appeals' mandate in *Janusz I*. We begin by noting that the *Janusz I* opinion is "conclusive as to the points decided. . . ." Rule 8-604(d)(1). The Court of Appeals made it clear that Janusz's unjust enrichment claim "cannot succeed if the Agreement fully addresses the subject matter," 404 Md. at 541, and remanded the case to the circuit court for it to determine whether the COAP amended the agreement. *Id*. The circuit court concluded that the COAP was a valid amendment of the Agreement, a conclusion that neither party now contests. This being the case, the reasoning of the Court's opinion in *Janusz I* points, ineluctably in our view, to an entry of judgment in Gilliam's favor on the unjust enrichment count. The circuit court's dismissal of the claim without prejudice would permit Janusz to bring an unjust enrichment action in the future. Such an outcome would be clearly inconsistent with *Janusz I*, because that opinion states, in no uncertain terms, that Janusz does not have a cause of action for unjust enrichment if the COAP is a valid amendment to the Agreement.[6]

When the circuit court decided this matter on October 10, 2008, it could have entered judgment against Janusz on her unjust enrichment claim at that time. Instead, the court ordered the parties to renegotiate the terms of the Agreement, as they were required to do under the terms of the COAP, with the assistance of a court-appointed mediator. While the court eventually denied Janusz's request to enforce and modify the terms of the Agreement on July 21, 2009, the court has not explicitly entered judgment on the unjust enrichment claim. We will vacate the circuit court's judgment and remand this case with instructions for it to enter judgment in favor of Gilliam on Janusz's unjust enrichment claim.

III. The Award of Attorney's Fees

Gilliam makes a number of arguments to encourage this Court to reverse the circuit court's grant of attorney's fees. The only such contention that we will discuss is the one which we think is dispositive; namely, the absence of a breach of the Agreement on Gilliam's part.

The circuit court found that Gilliam breached the Agreement twice, once by obtaining an absolute divorce, and again by failing "to continue funding and maintain in effect his survivor's annuity through the Civil Service Retirement System. . . ." We disagree and

address these alleged breaches in order.

The problem with the first basis for the circuit court's conclusion that Gilliam breached the Agreement is that there is nothing in the Agreement that precluded either party from seeking a divorce. In fact, the Agreement expressly contemplated such a step, because it provided that "this Agreement shall be, in the event of divorce proceedings between the parties, submitted to the court for approval and incorporation into the final Decree of Divorce, but that the Agreement shall not merge into any such Decree." While Maryland law imposes upon Gilliam an obligation of good faith and fair dealing in the performance of his contractual obligations, *Parker v. Columbia Bank*, 91 Md. App. 346, 366 (1992), "the covenant of good faith and fair dealing does not obligate a [party] to take affirmative actions that the [party] is clearly not required to take under the [contract]. . . . it is not understood to interpose new obligations about which the contract is silent, even if inclusion of the obligation is thought to be logical and wise." *Blondell v. Littlepage*, 413 Md. 96, 114 (2010) (internal citations and quotations omitted). *Id.* There is no basis to conclude that Gilliam breached the Agreement by filing for, and eventually obtaining, an absolute divorce.

Second, Gilliam's inability to comply with the requirement that he continue to fund and maintain the survivor annuity did not constitute a breach of the Agreement because the Agreement, as modified by the COAP, expressly addresses the situation that confronted the parties. The Agreement, as amended, did not require Gilliam to continue to make payments; instead, it required Gilliam and Janusz to renegotiate the terms of the Agreement itself. The evidence before the circuit court was that Gilliam renegotiated with Janusz in good faith.[7]

The COAP and the Agreement, read together, provide that if the COAP was not acceptable to the OPM, the parties would adjust the Agreement to assure a mutually beneficial result. To hold now that the OPM's rejection of the COAP constitutes a breach by Gilliam converts paragraph eight of the COAP from a binding and mutually-agreed upon contractual term into mere surplusage. *See Cochran v. Norkunas*, 398 Md. 1, 17 (2007) ("A recognized rule of construction in ascertaining the true meaning of a contract is that the contract must be construed in its entirety and . . . effect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language. . . .") (quoting *Sagner v. Glenangus Farms*, 234 Md. 156, 167 (1964)).

We conclude that the circuit court erred when it determined that Gilliam was in breach of the Agreement. Because he was not, there was no basis for the circuit court to award Janusz attorney's fees.

IV. Lis Pendens

The information provided by the parties on this issue is extremely sketchy, but it appears that, under the terms of the Agreement, Janusz executed two quitclaim deeds conveying to Gilliam whatever interest she had in two parcels of real property owned by Gilliam (or perhaps by Gilliam and Janusz jointly). One, apparently Gilliam's residence, is in Montgomery County; the other is in Worcester County.

In Janusz's complaint, filed on January 25, 2006, she alleged that the properties were then owned by the Frank P. Gilliam Living Trust (the "Trust"), which had been formed with the purpose of "reducing [Gilliam's] potential estate to zero value for the purpose of attempting to put same out of reach of, *inter alia*, [Janusz]." In the rescission count of the complaint, Janusz sought rescission of the Agreement, the imposition of a constructive trust upon the two properties, and the sale of the properties by a court-appointed trustee with the proceeds to be divided equitably between the parties. In her unjust enrichment count, she sought essentially the same relief. The complaint asserted that it was *lis pendens* as to the title to both properties. The complaint named the Trust as an additional defendant. From the docket entries, it appears that the Trust is still a party to the case and, we assume, still holds title to the properties.

On January 4, 2010, Gilliam, but not the Trust, filed a motion seeking to remove the Montgomery County property from the *lis pendens* effect of the pending action. Gilliam relied upon Maryland Rule 12-102(c), which provides that a *lis pendens* can be terminated in a pending action "[o]n the motion of a person in interest and for good cause." The court determined that Gilliam had failed to demonstrate good cause and, therefore, denied the motion.

Gilliam appeals the circuit court's refusal to remove the *lis pendens* on his property. Gilliam argues that the basis for the *lis pendens* action was Janusz's rescission claim, which was denied by the Court of Appeals, and her unjust enrichment claim, which was dismissed by the circuit court. Gilliam contends that Janusz ultimately requested a money judgment from the court, not a property settlement, thus rendering the concept of *lis pendens* inapplicable to the Montgomery County property. Therefore, Gilliam concludes, the court erred in refusing to grant his request to remove the *lis pendens*.

Janusz counters that her claim for unjust enrichment is "alive and well" because neither the Agreement nor the COAP provide a resolution for the situation in which the OPM refuses to honor the survivor annuity that Gilliam covenanted to maintain. Furthermore, Janusz contends that this Court may provide her with restitution by granting her request that

the deeds of property she executed in favor of Gilliam be declared void. Janusz argues that, because her claims for unjust enrichment and restitution via rescission of the transfer of deeds may be granted by this Court, a property settlement is still a possibility and the *lis pendens* was rightly maintained.

In *Park & Planning v. Washington Grove*, 408 Md. 37, 88 (2009), Judge Harrell explained for the Court that:

> Lis pendens literally means a pending action; the doctrine derives from the jurisdiction and control which a court acquires over property involved in an action pending its continuance and until final judgment is entered. Under the doctrine, one who acquires an interest in the property pending litigation relating to the property takes subject to the results of the litigation. *It is clear that the doctrine has no application except where there is a proceeding directly relating to the property in question, or where the ultimate interest and object of the proceeding is to subject the property in question to the disposal of a decree of the court.*

(citations and quotation marks omitted; emphasis added in *Park & Planning*.)

Moreover, "*[l]is pendens* has no applicability . . . except to proceedings directly relating to the title to the property transferred or in which the ultimate interest and object is to subject the property in question to the disposal of a decree of the court." *DeShields v. Broadwater*, 338 Md. 422, 435 (1995). "This is so because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party." *Id*. (internal quotations removed).

As we have explained, in *both* counts of her complaint, Janusz sought to impose a constructive trust on the properties and requested that the court order a sale of the properties and the equitable division of the proceeds. Therefore, the causes of action in both counts constituted *lis pendens* with regard to the properties. The rescission count was resolved by the Court of Appeals in *Janusz I*, and the circuit court's determination that the COAP was a valid amendment to the Agreement resolved the unjust enrichment claim. However, the circuit court's judgment in the remand proceedings was on appeal when Gilliam filed his motion to terminate the *lis pendens* effect of the unjust enrichment claim. The circuit court did not abuse its discretion in concluding that he had failed to demonstrate good cause as to why his Montgomery County residence should have been released from the *lis pendens* effects of this litigation while an appeal is pending.

V. Conclusion

The circuit court's determination that the COAP was a valid amendment to the parties' Agreement precludes Janusz's claim for unjust enrichment because that remedy does not lie in cases where, absent fraud or bad faith, an express contract fully addresses the subject matter. *Janusz I*, 404 Md. at 537. The Court also concluded that the COAP has explicit provisions addressing what the parties' rights and obligations are in the event that the OPM determined that Janusz was not eligible for a survivor's annuity. *Id*. at 538. Having found that the COAP was a valid amendment to the Agreement, the circuit court should have entered judgment in Gilliam's favor on the unjust enrichment count. What effects such a judgment might have on an action by Janusz against Gilliam or his estate arising out of an alleged inability or unwillingness to comply with the terms of the COAP regarding the parties' obligations to renegotiate the terms of the Agreement, are questions that can only be resolved if and when such an action is brought.

The circuit court erred in awarding Janusz attorney's fees because Gilliam did not breach the Agreement, a prerequisite for such an award. Finally, the circuit court did not abuse its discretion in denying Gilliam's motion to release his property from the *lis pendens* effect of this action while it was still pending.

AS TO APPEAL NO. 02361, SEPTEMBER TERM, 2009:

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ENTERED ON JULY 20, 2009 IS VACATED AND THIS CASE IS REMANDED FOR THE ENTRY OF JUDGMENT IN FAVOR OF APPELLANT WITH REGARD TO APPELLEE'S UNJUST ENRICHMENT CLAIM. THE JUDGMENT OF THE CIRCUIT COURT ENTERED ON JULY 21, 2009 AWARDING APPELLEE $90,000 FOR ATTORNEY'S FEES AND EXPENSES IS REVERSED.

AS TO APPEAL NO. 118, SEPTEMBER TERM, 2010:

THE ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY DENYING APPELLANT'S MOTION TO TERMINATE *LIS PENDENS* IS AFFIRMED.

ONE-THIRD OF THE COSTS AS TO BOTH APPEALS TO BE PAID BY APPELLANT; THE REMAINING COSTS BY APPELLEE.

FOOTNOTES

1. The Court also noted that Gilliam filed a cross-appeal. The Court's framing of the issues before it encompassed the issues raised by both parties.

2. The Court also held that the provisions of paragraph five of the Agreement, pertaining to waiver of claims, did not bar Janusz's action for unjust enrichment. *Id.* at 530.

3. Before the Court of Appeals, Gilliam asserted that his attorney's signature to the COAP was unauthorized. Gilliam abandoned this contention in the remand proceedings.

4. Appellant frames the issues thus:

> I. Pursuant to Maryland Civil Procedure Rule 8-604(D)(1) and the stated purpose for the Court of Appeals' limited remand, the trial court improperly went beyond the scope of the Court of Appeals' mandate.
>
> II. The lower court abused its discretion by denying appellee's "request to enforce or modify", *without prejudice to any future claim she may have as a result of Appellant's death.*
>
> III. The court lacked authority and/or jurisdiction to award appellee $90,000 in attorneys' fees based on an alleged "default" by appellant.
>
> IV. Due to the record and the Court of Appeals' directives on remand, appellee's motion for summary judgment was improperly granted, and genuine material facts in dispute precluded summary judgment.
>
> V. The court erred in failing to supplement the record and denying appellant's motion to alter or amend.
>
> VI. The court erred in denying appellant's request to terminate the notice of *lis pendens*.

5. In his reply brief Gilliam filed a "Motion to Dismiss/Strike," requesting that this Court to dismiss or strike portions of Janusz's brief. The motion is without merit and is denied.

In his brief, Gilliam also contends that the court erred in refusing to grant his motion to supplement the record. In light of our resolution of the dispositive issues in this ease, we need not address this argument.

6. Gilliam argues that the circuit court's denial of Janusz's "request that the Court enforce and modify the terms" of the Agreement "*without prejudice* to any claim [Janusz] may have as a result of [Gilliam's] death," (emphasis added) robs the court's judgment of the claim preclusive effect to which he would otherwise be entitled.

The Court's opinion in *Janusz I* did not address, in any way, whether Janusz might have causes of action (other than rescission and unjust enrichment) against Gilliam arising out of the inability or unwillingness of the parties to modify the terms of the Agreement. We believe that the circuit court was correct in observing that such a claim might not arise until Gilliam's death. Consideration of the *res judicata* and collateral estoppel effects, if any, that a judgment in Gilliam's favor on the unjust enrichment claim might have upon hypothetical, and unidentified, claims that Janusz might assert at some point in the future is so hopelessly speculative that we need not discuss it further other than to note that we express no opinion on the matter.

7. Additionally, even after the OPM finally ruled that Janusz was not eligible for a survivor's annuity, Gilliam made three monthly annuity contributions, all of which were returned to him by OPM. A party's failure to perform a contract is excused when performance would be futile through no fault of his own. *See* RESTATEMENT 2D CONTRACTS §261.

NO TEXT

Cite as 2 MFLM Supp. 59 (2012)

Divorce: motion to reopen judgment: fraud, mistake or irregularity

Tibebe Samuel

v.

Bezuayehu Yenefanta

No. 2408, September Term, 2010

Argued Before: Krauser, C.J., Wright, Kenney, James A., III (Ret'd, Specially Assigned), JJ.

Opinion by Wright, J.

Filed: January 5, 2012. Unreported.

Husband's allegations of intrinsic fraud by his wife and her counsel were not sufficient grounds to reopen the judgment of absolute divorce for a new hearing.

On June 18, 2009, appellant, Tibebe Samuel ("Husband"), filed a motion to reopen the judgment of absolute divorce between him and his previous wife, Bezuayehu Yenefanta ("Wife"), in the Circuit Court for Prince George's County. After hearing the matter on August 16, 2010, the court denied Husband's motion. On or about August 24, 2010, Husband filed a motion to reconsider, which the court also denied. This appeal followed.

Husband asks us to determine whether the circuit court abused its discretion in denying the motion to reconsider, in light of alleged fraud on the part of Wife and her previous counsel.[1] For the reasons set forth below, we affirm the trial court's judgment.

Facts

It is undisputed that Husband and Wife were married in January 1998 and had two children during the marriage. On June 29, 2005, Wife filed a complaint for absolute divorce. However, the parties reconciled, and Wife filed a motion to withdraw her complaint on August 11, 2005.

In April 2006, the parties separated, and on June 29, 2006, Wife again filed for divorce. On February 5, 2007, the court ordered Husband to pay the sum of $1,211 per month as child support, and on April 2, 2007, awarded sole legal and physical custody of the parties' minor children to Wife. On May 29, 2007, the court granted Wife an absolute divorce from Husband. The court also awarded Wife a monetary award of $51,918.26 and $1,500.00 for attorney's fees. Husband was ordered to pay alimony in the amount of $2,000.00 per month for 18 months. On June 28, 2007, the judgment of divorce was entered.

Ed. note: Unreported opinions of the states courts of appeal are neither precedent nor persuasive authority. Rule 8-114. Unofficial publication of an unreported opinion does not alter the force of that rule. See Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 566 A.2d 135 (1989). Headnotes are not from the courts but are added by the editors. Page numbers are from slip opinions.

Discussion

Husband argues that the circuit court abused its discretion in not modifying or revising its child support and alimony orders. According to Husband, both amounts are too high as a result of fraud perpetrated by Wife when she falsified pay stubs and other information relating to Husband's income.

In response, Wife contends that this Court should review only the trial court's denial of Husband's motion to reconsider, and not his motion to reopen. Alternatively, if we do reach the merits of Husband's motion to reopen, Wife urges us to conclude that there has been no fraud that would allow either the child support or the alimony judgment to be set aside.

The Maryland Rules provide several vehicles for filing post-judgment motions, including motions to alter or amend judgment pursuant to Rule 2-534[2] and motions to revise under Rule 2-535.[3] A motion to reconsider is in the nature of a post-judgment motion and, if filed within 10 days after entry of a judgment, should be treated as a motion to alter or amend under Rule 2-534. *Sieck v. Sieck*, 66 Md. App. 37, 44-45 (1986) ("[A] motion to revise the judgment, however labeled, filed within ten days after the entry of judgment will be treated as a Rule 2-534 motion. . . ."); *Davis v. Davis*, 97 Md. App. 1, 18-19 (1993). By contrast, a post-judgment motion filed more than 30 days after the entry of judgment is treated as a motion to revise under Maryland Rule 2-535(b), allowing the court to revise the judgment only if there is a finding of fraud, mistake, or irregularity. *See Tandra S. v. Tyrone W.*, 336 Md. 303, 313 (1994) (superceded by statute on other grounds); Md. Code (1973, 2006 Repl. Vol.), § 6-408 of the Courts & Judicial Proceedings Article.

"[T]he ruling on a motion for reconsideration is ordinarily discretionary, and . . . the standard of review in such a circumstance is whether the court abused its discretion in denying the motion." *Wilson-X v. Dep't of Human Res. ex rel. Yasmin*, 403 Md. 667, 674-75

(2008). In this case, the court's exercise of its discretion in ruling upon Husband's motion to reconsider is predicated on Husband's arguments in his motion to reopen, Therefore, we shall first review the court's reasoning in denying Husband's motion to reopen.[4]

Because Husband filed his motion to reopen nearly two years after the entry of the judgment of divorce, we shall treat it as a motion to revise under Maryland Rule 2-535(b). We shall determine whether there was, as alleged by Husband, extrinsic fraud that would have permitted the trial court to revise the judgment. *Wells v. Wells*, 168 Md. App. 382, 394 (2006) ("The existence of a factual predicate of fraud, mistake, or irregularity, necessary to support vacating a judgment under Rule 2-535(b), is a question of law.") (Citing *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997)). In other words, we will deny the relief sought by Husband unless the trial court abused its discretion in reaching the legal conclusion that Husband did not prove extrinsic fraud by clear and convincing evidence.

To set aside a judgment under Rule 2-535(b), the moving party must demonstrate by clear and convincing evidence fraud, mistake, or irregularity. *Davis v. Attorney Gen. of Md.*, 187 Md. App. 110, 123-24 (2009). "[T]he terms 'fraud, mistake [and] irregularity' have been narrowly defined and strictly applied." *Autobahn Motors, Inc. v. Mayor & City Council of Balt.*, 321 Md. 558, 562 (1991) (citing *Andresen v. Andresen*, 317 Md. 380, 389 (1989)). A trial court may only revise a judgment under Rule 2-535(b) if the moving party can demonstrate the existence of extrinsic fraud as opposed to intrinsic fraud. *De Arriz v. Klingler-De Arriz*, 179 Md. App. 458, 470 (2008). *See also Fischer v. DeMarr*, 226 Md. 509, 518 (1961); *Bachrach v. Wash. United Coop.*, 181 Md. 315, 321 (1943). The definition of extrinsic fraud was provided by the Supreme Court in *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878):

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, — these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.

(Citations omitted).

"Maryland courts have firmly adhered to the *Throckmorton* definition of extrinsic fraud." *Bland v. Hammond*, 177 Md. App. 340, 351(2007). *See also Schwartz v. Merchs. Mortgage Co.*, 272 Md. 305, 308-11(1974); *Md. Steel Co. v. Marney*, 91 Md. 360, 375-77 (1900). "In determining whether or not extrinsic fraud exists, the question is not whether the fraud operated to cause the trier of fact to reach an unjust conclusion, but whether the fraud prevented the actual dispute from being submitted to the fact finder at all." *Hresko v. Hresko*, 83 Md. App. 228, 232 (1990) (citation omitted). Conversely, intrinsic fraud occurs in the course of the proceedings, such as when "a witness perjures himself or a party offers a forged instrument into evidence." *Das v. Das*, 133 Md. App. 1, 18 (2000) (citation omitted).

In this case, Husband asserts that Wife "willfully misrepresented material facts, omitted essential information, [and] submitted fraudulent document[s]." These are allegations of *intrinsic* fraud. Such allegations are insufficient to open a case for a new hearing in Maryland. Given that Wife's allegedly fraudulent actions are not extrinsic fraud, the circuit court did not err or abuse its discretion in denying Husband's motion to reopen. Likewise, the court did not abuse its discretion in denying Husband's motion to reconsider.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. In his brief, Husband, who has filed this appeal pro se, asked:

> 1. Did the Circuit Court commit reversible error by abusing its discretion and by denying the Appellant's motion when there was Fraud committed by the Appellee?
>
> 2. Did the Circuit Court commit reversible error by abusing its discretion and by denying the appellant's motion when there is clear and convincing evidence Fraud was committed up on the court by an officer of the court who was the former attorney of the Appellee?
>
> 3. Did the Circuit Court violated [sic] the

> Appellant's constitutional right by allowing the final judgment on this case to stand when the evidence shows that the Appellee and her former attorney, Patricia McCarthy, concoct [sic] some unconscionable scheme calculated to impair [the] court's ability fairly and impartially to adjudicate dispute?

2. That Rule states:

> In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial. A motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

3. Rule 2-53 5 states, in pertinent part:

> (a) *Generally*. On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
>
> (b) *Fraud, mistake, irregularity*. On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

4. Accordingly, we reject Wife's argument that, because Husband cited only the December 13, 2010 judgment in his notice of appeal, our review is limited to the motion to reconsider. *See Newman v. Reilly*, 314 Md. 364, 383 (1988); *Hermina v. Balt. Life Ins. Co.*, 128 Md. App. 568, 576 (1999).

INDEX